Supreme Court, U.S.
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No. 02-1151

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IN THE

Supreme Court of the United States

CAROLYN A. ("HOWERTER") LA FAVRE, AND JAMES SCOTT MERRITT, JR., ON BEHALF OF THEMSELVES AND ALL SINGLE KANSAS INCOME TAX PAYERS,

Petitioners,

v.

KANSAS DEPARTMENT OF REVENUE, A KANSAS AGENCY, TIM SHALLENBURGER, AS STATE TREASURER OF KANSAS, STEPHEN S. RICHARDS, SECRETARY OF REVENUE OF THE KANSAS DEPARTMENT OF REVENUE, JEFFREY LOCHOW, DIRECTOR OF DIVISION OF TAXATION OF THE KANSAS DEPARTMENT OF REVENUE, AND DAVID J. HEINEMANN, AS AGENT AND DESIGNEE OF SECRETARY OF REVENUE AND OF DIRECTOR AND DIVISION OF TAXATION OF KANSAS DEPARTMENT OF REVENUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners invoked the original jurisdiction of the Supreme Court of Kansas, asserting the federal constitutional claim that there is a fundamental right of United States citizens "to be and remain single," *inherent* in the citizens via the "liberty interest" secured by the First and Fourteenth Amendments, and that exercise of such right was penalized by unique surtax levies imposed on *all unmarried individuals*, under Kansas' one-off "income tax" regime for 1988-1997. By resort to one proceeding against officials in mandamus, petitioners (i) mounted a facial challenge to the levying statutes, (ii) asked the court to strike the penalty elements built into the statutory rates, and (iii) sought an order to respondents for ministerial refund or credit redress for all "deprived" single citizens.

The questions presented here are:

1. Whether under the Fourteenth Amendment and doctrine expounded by this court in *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999), and *Richards v. Jefferson County*, 517 U.S. 793 (1996) (involving citizens' access to court), the Supreme Court of Kansas denied procedural and remedial due process to petitioners and to the mass of Kansas single taxpayers, *by rejecting without opinion their petition for mandamus*, thus defaulting any holding for review in this court as to the substantive federal constitutional claims asserted by petitioners (that their fundamental right was surtaxed), and by defaulting any address to constitutional due process standards, as expounded in *Reich v. Collins*, 513 U.S. 106 (1994), applicable to any preclusive state law doctrine.

2. Whether there is an inherent fundamental right to be and remain single which was penalized by Kansas' unique surtax levies on all single persons during 1988-1997.

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Cited Authorities	iv
Table of Appendices	xv
Petition for Certiorari	1
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
I. Federal Questions Raised In The Pleadings Below	1
II. Proceedings Below	3
III. Petitioners' Substantive Claims	8
A. The Fundamental Right to Marry, or Not Marry	8
B. Related Matters of Kansas Power	9
IV. Remedies	10
V. Background of the Levies and a Prior Failed Challenge	14

Contents

	Page
Reasons for Granting the Writ	19
I. This Court Should Decide Whether in the Case of a Statewide Statutory Levy Challenged by Citizens as Void on its Face Under the Fourteenth Amendment, Their Due Process Rights of Access to Court Actually Encompass a Right to Seek Judicial Remediation in Favor of All Afflicted Citizens Against Responsible Officials, "in a Single Action."	19
II. If an Inherent Fundamental Right of Citizens to Be and Remain Single Exists, Antecedent to (or in Tandem with) the Fundamental Right to Marry, Kansas Had No Power to Systematically Surtax All Single People. The Importance of Review Here is to Establish That Equal Protection Lore May Not Be Stretched to Create Such a Power.	23
A. Griswold's Error	23
B. Lore From the Federal Courts (Griswold's Maxim)	24
C. Burdens on Fundamental Rights	26

Contents

Page

III. The Rejection Below Terminated Petitioners' Constitutional Claims, and Thereby Denied Due Process to Petitioners. Other Doctrine Explained in *Richards v. Jefferson County*, *supra*, and *South Central Bell Tel. Co. v. Alabama*, *supra*, was Ignored, in That the Due Process Implications of Any Affirmative Preclusive Defenses Respondents Might Have Urged Cannot Be Reviewed in this Court, Except by Speculating. 28

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Arkansas Building & Loan Assn. v. Madden, 175 U.S. 269 (1899) 21

Associated Industries of Mo. v. Lohman, 511 U.S. 641 (1994) 24

Atchison, Topeka & S. F. Ry. Co. v. O'Connor, 223 U.S. 280 (1912) 23, 30

Bailey v. Drexel Furniture Co., 259 U.S. 20 (1922) 27

Beadles v. Smyser, 209 U.S. 393 (1908) 22

Board of Liquidation v. McComb, 92 U.S. (2 Otto) 531, 23 L. Ed. 623 (1876) 7, 4, 20

Boddie v. Connecticut, 401 U.S. 371 (1971) 22

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673 (1930) 19, 29

Brown v. Maryland, 25 U.S. (12 Wheat.) 419 (1827) 27

Burrill v. Locomobile Co., 258 U.S. 34 (1922) 22

Cary v. Curtis, 44 U.S. (3 How.) 236, 11 L. Ed. 576 (1845) 8

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Page

Christopher v. Harbury, No. 01-394, __ U.S. __ (June 20, 2002) 20

The City of Chicago v. Dows, 78 U.S. (11 Wall) 108, 20 L. Ed. 65 (1871) 4, 21, 23

Commissioner v. Sunnen, 333 U.S. 591 (1948) 29

County of Lincoln v. Luning, 133 U.S. 529 (1890) 22

Dean v. Kansas, 250 Kan. 417, 826 P.2d 1373 (Kan. 1992) 5, 18

Dodge v. Woolsey, 59 U. S. (18 How.) 331, 15 L. Ed. 401 (1856) 21

Duke v. Turner, 204 U.S. 623 (1907) 13, 29

Eastern Enterprises v. Apfel, 524 U.S. 498 (1998) ... 8

Farmers Banshares of Abilene v. Graves, 250 Kan. 520, 826 P. 2d 1363 (Kan. 1992) 5, 18

Garrett v. Bamford, 538 F.2d 63 (3d Cir. 1976), *cert. den.*, 429 U.S. 977 (1976) 21

General Oil Co. v. Crain, 209 U.S. 211 (1908) 1, 19, 29, 30

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Cited Authorities

	Page
Hansberry v. Lee, 311 U.S. 32 (1940)	16
Hoeper v. Tax Comm. (Wisc.), 284 U.S. 206 (1931)	9
Jackson Co. (Kansas) v. United States, 100 F. 2d 929 (10th Cir. 1939), *mod.*, 308 U.S. 343 (1939)	13, 30
Jackson Co. (Kansas) v. United States, 308 U.S. 343 (1939)	13
Javor v. State Bd. Equalization, 12 Cal. 3d 790, 117 Cal. Rptr. 305, 527 P.2d 1153 (Cal. 1974)	7
Johnson v. United States, 422 F. Supp. 958 (N.D. Ind. 1976), *aff'd. sub nom. Barter*, 550 F. 2d 1239 (7th Cir. 1977), *cert. den.*, 434 U.S. 1012 (1978)	24
Kansas ex rel. Moore v. Wichita, 184 Kan. 196, 335 P.2d 786 (Kan. 1959)	9, 10
Kansas v. Crane, No. 00-957, __U.S. __ (January 22, 2002)	28
Kendall v. United States ex rel. Stokes, 37 U.S. (12 Pet.) 524 (1838)	20
Kittredge v. Boyd, 136 Kan. 691, 18 P. 2d 563 (Kan. 1933)	7
Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982)	19, 20

Cited Authorities

Page

Loving v. Virginia, 388 U.S. 1 (1967) 8, 26

Lujan v. G & G Fire Sprinklers, Inc., 532 U.S. 189 (2001) 21

Lunding v. New York Tax Appeals Trib., 522 U.S. 287 (1998) 3

Mapes v. United States, 576 F.2d 896 (Ct. Cl. 1978), *cert. den.*, 439 U.S. 1046 (1978) 25

Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) 6, 20

McKesson v. Division of Alcoholic Beverages, 496 U.S. 18, 36 (1990) 8, 29

Montana v. Crow Tribe of Indians, 523 U.S. 696 (1998) 13, 30

Murdock v. Pennsylvania, 319 U.S. 105 (1943) ... 9

Newsweek, Inc. v. Florida Dept. Rev., 522 U.S. 442 (1998) 19, 29, 30

Ogden City v. Armstrong, 168 U.S. 224 (1897) ... 7

Panhandle Eastern Pipeline Co. v. Fadely, 183 Kan. 803, 332 P. 2d 568 (Kan. 1958) 9

Patterson, Com'r. v. Gladwin Corp., et al., 2002 Westlaw 1003524, __ So. 2d __ (Ala., May 17, 2002, no. 1001747) 5, 6, 20, 22

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Page

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Peden v. Kansas, S. Ct. Case No. 96-1459 17

Phillips Petroleum Co. v. Shutts, 472 U.S. 797 (1985) 21

Reich v. Collins, 513 U.S. 106 (1994) ..... i, 20, 21, 29

Republican Part of Minnesota, et al. v. White, No. 01-521, __U.S. __ (June 27, 2002) 27

Reynolds, et al. v. Beneficial National Bank, et al., 2002 Westlaw 655931, __ F.3d __ (7th Cir. 2002) 20

Richards v. Jefferson County, 517 U.S. 793 (1996) .. .. i, 4, 28, 29

Santa Barbara Optical Co. v. State Bd. Equalization, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (Cal. App. 1975) 7

Savings & Loan Assn. v. Topeka, 87 U.S. (20 Wall.) 655, 22 L.Ed. 455 (1875) 27

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Cited Authorities

Page

South Central Bell Tel. Co. v. Alabama, 526 U.S. 160 (1999) ..... i, 5, 22, 28, 29, 30

Sowders v. Oklahoma Tax Comm., 552 P.2d 698 (Okla. 1976) 26

State v. Atherton, 139 Kan. 197, 30 P.2d 291 (Kan. 1934) 28

State v. Gowdy, 62 Mont. 119, 203 P. 1115 (Mont. 1922) 26

State v. Kelly, 71 Kan. 811, 81 P. 450 (Kan. 1905) ... 10

Stewart Dry Goods Co. v. Lewis (I), 287 U.S. 9 (1932) 22

Tennessee v. Sneed, 96 U.S. 69, 24 L. Ed. 610 (1877) 21

Truax v. Raich, 239 U.S. 33 (1915) 27

United States v. Osage County (Okla.), 251 U.S. 128 (1919) 7

Virginian Ry. Co. v. System Federation, 300 U.S. 515 (1937) 13

Vivien Kellems, 58 T.C. 556 (1972), *aff'd. per curiam*, 474 F. 2d 1399 (2d Cir. 1973), *cert. den.*, 414 U.S. 831 (1973) 25

Ward v. Love County (Okla.), 253 U.S. 17 (1920) 7, 23, 30

Cited Authorities

Page

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Wheeler v. Weightman, 96 Kan. 50, 149 P. 977 (Kan. 1915) 10

Zablocki v. Redhail, 434 U.S. 374 (1978) 22

Zarda v. Kansas, 250 Kan. 364, 826 P.2d 1365 (Kan. 1992) 4, 5, 18, 26

United States Constitution:

Article I, § 10 27

First Amendment 12, 14, 24, 26, 27

Fifth Amendment 13

Fourteenth Amendment ..... i, 1, 3, 19, 26, 27, 29

Tenth Amendment 27

Eleventh Amendment 18, 19

Cited Authorities

Page

Statutes:

26 U.S.C. § 1 ..... 23, 24, 25

28 U.S.C. § 1257(a) 1

28 U.S.C. § 1341 18

42 U.S.C. § 1983 ..... 1, 6

K.S.A. § 60-801 ..... 1, 3, 6

K.S.A. § 74-2426(d) 11

K.S.A. § 79-32,100(d) 12

K.S.A. § 79-32,104 ..... 12, 17

K.S.A. § 79-32,105(a) 1

K.S.A. § 79-32,105(b) 1, 15

K.S.A. § 79-32,105(c) 1, 3, 6, 10

K.S.A. § 79-32,108 13

K.S.A. § 79-32,110 ..... 1, 8, 12, 17, 24

K.S.A. § 79-32,193 15

K.S.A. § 79-3235 11

K.S.A. § 79-3239 ..... 4, 13

Cited Authorities

	Page
K.S.A. § 79-3296	11
1997 Session Laws of Kansas, Ch. 41, Sec. 13	17
1998 Session Laws of Kansas, Ch. 130, Sec. 19	12, 17
Rule:	
Kansas Supreme Court Rule 9.01(a)	4
Kansas Supreme Court Rule 9.01(b)	3
Other Authorities:	
Kansas Bill of Rights § 3	1, 6
Kansas Constitution Art. 2, § 16	9
Kansas Constitution Art. 3, § 3	3, 6, 7
Kansas Constitution, Art. 11, § 2	14
Kansas Constitution, Art. 11, § 5	10, 14
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Page

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The Sun Newspapers, Johnson County, Kansas (December 31, 1997) 17, 18

Woolhandler, Ann, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77 (1997) 20

Woolhandler, Ann, *Patterns of Official Immunity and Accountability*, 37 Case Western L. R. 396 (1987) 20

TABLE OF APPENDICES

Page

Appendix A — Order Of The Supreme Court Of The State Of Kansas Denying Petition For Writ Of Mandamus And Order For Reassessment Dated March 20, 2002 ..... 1a

Appendix B — Order Of The Supreme Court Of The State Of Kansas Denying Motion For Rehearing To Vacate Dismissal And For Pre-Hearing Conference Dated April 25, 2002 ..... 3a

Appendix C — Constitutional And Statutory Provisions Involved 5a

Appendix D — Petition For Writ Of Mandamus And Order For Reassessment, Filed In The Supreme Court Of The State Of Kansas On February 6, 2002 ..... 14a

Appendix E — Memorandum Of Points And Authorities In Support Of Petition For Writ Of Mandamus Filed In The Supreme Court Of The State Of Kansas Dated February 6, 2002 ..... 55a

Appendix F — Motion For Rehearing And To Vacate Dismissal, And For Pre-Hearing Conference Filed In The Supreme Court Of The State Of Kansas Dated April 8, 2002 ..... 64a

PETITION FOR CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the final judgment of the Supreme Court of Kansas in this case, which terminated their proceeding below.

OPINIONS BELOW

There were no opinions. Petitioners raised their federal claims in a Petition for Writ of Mandamus and Order for Reassessment ("petition for mandamus"), Appendix ("Pet. App.") D, 14a - 54a. The Supreme Court of Kansas issued a two-sentence "denial," Pet. App. A, 1a - 2a, which is unpublished. That court's two-sentence "denial" of petitioners' later motion for rehearing, Pet. App. B, 3a - 4a, is also unpublished.

STATEMENT OF JURISDICTION

Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). The Supreme Court of Kansas denied petitioners' petition for mandamus on March 20, 2002. That court denied petitioners' motion for rehearing on April 25, 2002.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment, Kansas Constitution Art. 3, § 3, Kansas Bill of Rights § 3, Kansas Statutes Annotated ("K.S.A.") § 60-801, K.S.A. § 79-32,105(a)-(c), 42 U.S.C. § 1983, and relevant parts of laws amending the levying sections of K.S.A. § 79-32,110 (during 1988-97), are reprinted in Appendix C, Pet. App. 5a - 13a.

STATEMENT OF THE CASE

I. Federal Questions Raised In The Pleadings Below

Petitioners' federal constitutional claims were raised in their pleadings, as in *General Oil Co. v. Crain*, 209 U.S. 211, 212-216 (1908). They sought relief against respondents in mandamus and claimed that the unique rate structure imposed in Kansas income tax statutes systematically surtaxed (and thereby "penalized") *all* single persons in the exercise of their fundamental right to be and remain single (1988-1997). They sought ministerial refunds or allowance of forward credits

(to all Kansas single taxpayers) for their overpayments. The orders below merely dismissed and "noted" the pleadings in two sentences. The court did not address any "federal questions;" it terminated the proceeding. Petitioners' original Petition for Writ of Mandamus and Order for Reassessment ("petition for mandamus") appears in Appendix D, Pet. App. 14a - 54a; their accompanying Memorandum of Points and Authorities (required by Kansas rule) appears in Appendix E, Pet. App. 55a - 63a; their Motion for Rehearing appears in Appendix F, Pet. App. 64a - 75a.

Petitioners pled their constitutional claims and raised their federal questions below, according to the following two theorems:

(1) Where X= valid state statutory tax rates, and Y = a known citizen with a fixed dollar tax base (viz., Jane Doe and her "Kansas taxable income" for 1996) then:

X% × Y$ = "the right tax."

A statutory X may not penalize a group of Ys for simply exercising an inherent citizen-based fundamental right. In this case the judicial problem is adjudicating the facial constitutional validity of X. The problem for afflicted Ys is to find a court which will accord due process and hear their claims about X.

(2) If X is held infirm, and is thereupon judicially modified or "saved" into a valid percentage, then due process mandates that all the Ys who overpaid be accorded meaningful access to refunds or credits (and courts).

In this case, all the relevant Ys have already filed a return with respondents, disclosing their fixed dollar tax base. If X is held infirm, remediation of the Ys is a ministerial task. *The problem is not whether each and every Y is a deserving citizen.* State administrative remedial doctrine developed for cases involving a few Ys (who might seek to change their own taxable income numbers) is not compatible with meaningful due process remedies, where 400,000 - 500,000 citizens assail X.

II. Proceedings Below

Petitioners (on behalf of themselves and all single persons surtaxed by Kansas) on February 6, 2002 brought federal constitutional claims in their petition for writ of mandamus in the Supreme Court of Kansas, invoking that court's original jurisdiction under Kansas Constitution, Art. 3 § 3 and K.S.A. § 60-801, claiming their own rights to an adjudication and an order against respondents for official redress under the due process clause of the Fourteenth Amendment. Pet. App. D, 19a - 22a, *passim*. Petitioners also filed a Memorandum of Points and Authorities showing that mandamus is appropriate in Kansas where citizens raise a public question of fundamental constitutional rights, challenging a statute on its face, and seeking governmental ministerial relief, per Kansas Supreme Court Rule 9.01(b). Pet. App. E, 55a - 63a. K.S.A. § 79-32, 105(c) imposes the ministerial duty on respondents to refund or credit Kansas income tax overpayments *shown by any individual taxpayers' returns*. Pet. App. 7a - 8a.

Petitioners maintained that single persons who filed Kansas income tax returns and paid income taxes for any of the years 1988-1997 have a common fundamental right (to be and remain single) and the same chose in action for restitution of the unconstitutional statutory penalty elements.[1] Petitioners sought

1. *Lunding v. New York Tax Appeals Trib.*, 522 U.S. 287 (1998), illustrates a remedial problem petitioners seek to solve here. Mr. Lunding had taken his own case up the New York administrative and appellate system, pursuing various arguments. The right argument was that Lunding had a right to live in Connecticut and work in New York, protected under the privileges and immunities clause. New York was invalidly "surtaxing" his alimony (by denying an adjustment to New York source taxable income for alimony paid, but only as to non-residents), which smacked of a "penalty" per Justice O'Connor. But Mr. Lunding's claims below were not launched in such manner that all similarly "surtaxed" non-resident New York taxpayers could in fact benefit from a direct judicial order to officials (on remand below) to remediate each and every one. Other non-party New York non-resident returns (as filed) would not necessarily have disclosed the allowable alimony deduction in dollars. (Cont'd)

a judicial tribunal which could order the respondents to do their statutory duty as to income tax overpayments, and to allow forward credits or refunds to all afflicted single persons. *Richards v. Jefferson County*, 517 U.S. 793 (1996), seemed clear enough that they are entitled to make their own argument.

The petition was denied without opinion on March 20, 2002. Petitioners filed a motion for rehearing on April 8, 2002, Pet. App. F, 64a - 75a. They specifically entreated the Supreme Court of Kansas not to ignore the due process jurisprudence of the United States Supreme Court in this area, to hear their substantive federal constitutional claims, and to consider and fairly adjudicate the federal due process implications of any plea in bar respondents might assert. *Ibid.*, 65a, 67a, 68a, 69a - 74a. On April 25, 2002, petitioners' motion for rehearing was denied without opinion.

Under Kansas Supreme Court Rule 9.01(a), that court can transfer a controversy to a Kansas district court for "adequate relief." However, any mass relief from a trial court is foreclosed in this case. Kansas splits the matters of (i) adjudication on the constitutional merits of a given taxpayer's claim, completely away from (ii) any judicial capacity to order effective group-wide refund redress on identical claims. *Zarda v. Kansas*, 250

(Cont'd)

Remedies to all were not ". . . embraced in a single action." Cf., *The City of Chicago v. Dows*, 78 U.S. (11 Wall) 108, 112, 20 L. Ed. 65, 67 (1871).

In contrast, petitioners here sought an order in mandamus which would operate directly upon the official respondents, who in this case could easily redetermine overpayments from the returns already filed by single persons, which order would thus remediate *all* afflicted single taxpayers, once the "saved" or "correct" Kansas income tax *rates* were judicially determined. This case implicates no necessity of redetermining anyone's discrete dollar items of income or deductions, taxpayer by taxpayer. The Kansas statutory penalty rates can only be purged by the judiciary. K.S.A. § 79-3239. Then the respondent officials should do their duty. *Board of Liquidation v. McComb*, 92 U.S. (2 Otto) 531, 541, 23 L. Ed. 623, 628 (1876).

Kan. 364, 826 P.2d 1365 (Kan. 1992); *Dean v. Kansas*, 250 Kan. 417, 826 P.2d 1373 (Kan. 1992); *Farmers Banshares of Abilene v. Graves*, 250 Kan. 520, 826 P. 2d 1363 (Kan. 1992). In the foregoing cases, the problem was systematic administrative misfeasance (involving mass overcollections of motor vehicle and bank franchise taxes) practiced on Kansas taxpayers statewide, which raised constitutional arguments. Yet taxpayers got no holding on the merits, much less "class" relief. Under regnant doctrine of the Supreme Court of Kansas, statutory "review of administrative action" must be pursued by each overassessed taxpayer, as the *sine qua non* of ever getting a refund. The mass of taxpayers, who hadn't pursued administrative "claims," were not "before the court." *If the taxpayers weren't "before the court" they couldn't get their money back. There could be no "class;" therefore, no adjudication. Kansas kept the money.*[2]

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2. State fiscs will thrive on unconstitutional collections if administrative "claims multiplicity" defeats actual judicial orders for refunds to all afflicted citizens. Petitioners here are not "well financed corporations." They claim a common fundamental right to be and remain single, but could never afford to prosecute individualized refund claims.

In *Patterson, Com'r. v. Gladwin Corp., et al.*, 2002 Westlaw 1003524, __ So. 2d __ (Ala., May 17, 2002, no. 1001747), the Supreme Court of Alabama has read the Alabama Taxpayer Bill of Rights and Uniform Revenue Procedure Act to provide the *exclusive* remedial path for actual refunds of past franchise taxes imposed on all foreign corporations, which were held unconstitutional by this court in *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999). The Alabama remedial regime has become similar to that in Kansas, demanding administrative claims multiplicity, strictly according to positive statute law, for actual refunds, taxpayer by taxpayer. The *stare decisis* effect of *South Central Bell Tel. Co.* is of no import if each corporation has not filed a separate "claim." Yet petitioners understand that no one (claimants, ignorant small corporations, officials, or courts) actually knows what the *right (or "saved") franchise tax base or franchise tax levying rates actually were* for several thousand afflicted foreign corporations. The actual parties in *South Central Bell Tel. Co. v. Alabama*,

(Cont'd)

Petitioners sought to get *respondents* "before a court," and to get a "final judgment of the court," as to their federal claims. K.S.A. § 79-32,105(c) renders respondents subservient to the original jurisdiction of the Supreme Court of Kansas granted in Art. 3, § 3 of the Kansas Constitution, in mandamus. K.S.A. § 60-801, Pet. App. 6a, explains that mandamus runs to officials, whose duty results "by operation of law."

The Kansas Bill of Rights § 3 (conferring a Kansas right "to petition the government, or any department thereof"), and the Kansas Constitution, Art. 3, § 3, read together, led to the conclusion that the Supreme Court of Kansas is the tribunal to hear these citizen claims. Pet. App. 5a - 6a. The problem of subject matter limitations on "original" versus "appellate" jurisdiction, addressed by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), was definitively solved by Kansas in 1861, via Art. 3, § 3 (conferring "original jurisdiction . . . in mandamus"). Compare, Pfander, James E., *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L.R. 1515 (2001). Indeed, reading 42 U.S.C. § 1983 in both a declaratory and a federal rights granting sense, mandamus issuing from a state supreme court to vindicate individual fundamental rights against officials would be the "suit in equity," or *the* "proper proceeding for redress," where state positive law and explicit remedial doctrine

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(Cont'd)

supra, have settled their differences with Alabama privately. There is no common cause to change the actual corporate financial information already filed in any particular franchise tax return. The Alabama judiciary has not described any definitive means of computing "the right franchise tax" or an actual refund for any foreign corporation, at present. Two corporate taxpayers sought to bring a "class action" in a trial court on behalf of all similarly situated, to determine the "right franchise tax" and for group relief, but such is now held impossible. The common problem in *Patterson, Com'r. v. Gladwin Corp.*, *supra*, and the instant case is that piecemeal procedure under multiplicitous state remedial systems will not provide meaningful relief for a mass levy under an unconstitutional law.

seem to fail. Pet. App. 24a; *ibid*, 38a. Petitioners read *Kittredge v. Boyd*, 136 Kan. 691, 18 P.2d 563 (Kan. 1933), as a classic example of mandamus, in a case requiring restitution of an unconstitutional Kansas tax (also announcing the Kansas rule that any legislative attempt to appropriate constitutionally tainted money would be void). Petitioners claimed that Art. 3, § 3 of the Kansas Constitution does not wither away in the face of "administrative law." Petition for mandamus, ¶¶ 1.D - 1.G, Pet. App. 16a - 18a; *ibid*, ¶¶ 3.A - 7.D, Pet. App. 19a - 24a. Petitioners did not complain of administrative decisions during the collection of the levies.

Petitioners challenged the levying statutes themselves, which were emitted from the Kansas legislature, on their face. *Board of Liquidation v. McComb*, 92 U.S. (2 Otto) 531, 541, 23 L. Ed. 623, 628 (1876) (mandamus and injunction are somewhat related; officials may not rely on unconstitutional statute). A common sense approach to other statutory procedure was urged. *Cf.*, *Ogden City v. Armstrong*, 168 U.S. 224, 237-241 (1897) ("Where the tax was wholly void and illegal, as in this case, the statute and its remedies for error and irregularities have no application"). Petitioners asserted that due process principles involving citizen access to court and remediation, "in this case," require a means of plenary adjudication and meaningful mass remediation for all afflicted citizens. The case by case state system would not work. *United States v. Osage County (Okla.)*, 251 U.S. 128, 132-4 (1919) (where the state and counties systematically destroyed the federal rights of the class, equity would interpose against the officials); *Ward v. Love County (Okla.)*, 253 U.S. 17, 22-24 (1920) (which in effect ruled that constitutionally tainted tax money equitably reverted to all the payors, regardless of the state system).

Other state courts have agreed. *Javor v. State Bd. Equalization*, 12 Cal. 3d 790, 117 Cal. Rptr. 305, 527 P.2d 1153 (Cal. 1974); *Santa Barbara Optical Co. v. State Bd. Equalization*, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (Cal. App. 1975); *Ware v. Idaho State Tax Com.*, 98 *Id.* 477,

567 P.2d 423 (*Id.* 1977). Unjust enrichment of government is explicit in these cases; the official defendants already knew who the "deprived" persons were. They had paid over their own money pursuant to a systematic governmental collection system, but the relevant money should never have been collected. The defendants were retaining it; the citizens (all of them) wanted it back. *Defendants' own records told most of the tale in each instance.* X was valid enough, but had been misapplied to a group of Ys already known.

The unconstitutional result may be termed as "unjust governmental enrichment" (for state law purposes), or as a mass citizen "deprivation" (if a fundamental right is surtaxed under the XIVth), or a bright ruddy "taking" (where the state collects constitutionally tainted money, provides no viable remedy, and will not compensate or restitute). *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) (Breyer, J.) (the "due process" clause and takings clause are "neighbors"); *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 36 (1990) ("... exaction of a tax constitutes a deprivation of property. ..."); *Cary v. Curtis*, 44 U.S. (3 How.) 236, 11 L. Ed. 576 (1845) (Story, J. and McLean, J., each dissenting as to disremediation of taxpayer by new federal statute). So petitioners claimed in ¶ 10 of their petition for mandamus, and elsewhere. *Viz.*, Pet. App. 27a - 28a, 37a - 38a.

* * *

III. Petitioners' Substantive Claims

A. The Fundamental Right to Marry, or Not Marry

If there is a fundamental right to marry, petitioners claimed that there is an antecedent (or corollary) volitional right not to marry. *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Part II). It is a matter of "liberty" (via religious choice, or secular Blackstonian "freewill").

Petitioners claimed that the systematic penalty elements of the statutory rates levied under K.S.A. § 79-32,110 (1988-1997), amounting to *an explicit mathematical surtax on all single persons*, were facially unconstitutional under due process

principles and this court's doctrine of "hostile state invasion" of fundamental citizens' rights. *Murdock v. Pennsylvania*, 319 U.S. 105, 113 (1943) ("A state may not impose a charge for the enjoyment of a right granted by the Federal Constitution."); *Grosjean v. American Press Co.*, 297 U.S. 233, 245 (1936). Petitioners also asserted that a state may not impute or create extra income chargeable to a taxable citizen, based merely on his marital status. *Hoeper v. Tax Comm. (Wisc.)*, 284 U.S. 206 (1931).

B. Related Matters of Kansas Power

The petition for mandamus, ¶ 1.A-B, Pet. App. 15a - 16a, sought to focus on the matter of lack of sovereign power. There is no principle of Kansas common law which says that a femme sole earning $10,000 per year is richer (or more iniquitous) than a married couple aggregating $20,000 per year. There is no common law recognition that Kansas has prerogative to say anything in particular about the liberty interest of femmes soles or single people in general. Sovereign regulatory or common law husband-power over wives could not be a viable argument to expand Kansas' power over single people. Since 1861, married women have a separate estate in their own property. Kansas Constitution, Art. 15, § 6. The filing of joint income tax returns has always been elective.

Petitioners asserted in Count I of their petition for mandamus, Pet. App. 30a - 34a, that under Kansas own "single subject rule," Kansas Constitution Art. 2 § 16, the relevant levying bills were void *ab initio* since they improperly combined state revenue raising measures (viz., the imposition of taxes on the income of "individuals" for general use) with a levy putatively based on a notional state police or regulatory power. *Panhandle Eastern Pipeline Co. v. Fadely*, 183 Kan. 803, 332 P. 2d 568 (Kan. 1958). Regulatory power over marriage (if it extended to licensing single people to choose to be single people), under Kansas' own constitutional doctrine, could not have been exerted in combination with a general revenue raising (income taxing) bill. *Kansas ex rel. Moore v. Wichita*, 184 Kan.

196, 335 P.2d 786 (Kan. 1959). It would be "deceptive" to the voting legislators and the public. Art. 11, § 5 of the Kansas Constitution reinforces the foregoing rule, with the corollary that a tax law shall "distinctly state the object of the same. . . ."

There is also a Kansas tradition, posited in *Wheeler v. Weightman*, 96 Kan. 50, 67, 149 P. 977, 984 (Kan. 1915), ". . . in which the courts have refused to stultify themselves respecting the true character of legislation and have pierced through speciousness to reality. . . ." (so-called "registration fee" was an invalid tax). A graphic example is *State v. Kelly*, 71 Kan. 811, 81 P. 450 (Kan. 1905), in which the court declined to sanction a "deceptive" piece of legislation.

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IV. Remedies

It is the duty of respondents to correct the past Kansas income tax overassessments and issue refunds or forward credits (to succeeding taxable years) *to the account of all single citizens who were invalidly surtaxed, equal to the amounts overpaid,* based on their Kansas income tax returns (already filed). Respondents are charged with such ministerial responsibility under K.S.A. § 79-32,105(c):

> If the director discovers *from the examination of the return*, or upon claim duly filed by the taxpayer *or upon final judgment of the court* that the income tax, withholding tax, declaration of estimated tax or any penalty or interest paid by *or credited to any taxpayer* is in excess of the amount legally due, the director shall certify to the director of accounts and reports the name of the taxpayer, *the amount of refund* and such other information as the director may require. Upon receipt of such certification the director of accounts and reports shall issue a warrant on the state treasurer for the payment to the taxpayer out of the fund provided in subsection (b), except that no refund shall be made for a sum less than $5, but such amount may be claimed by the taxpayer as a credit against the taxpayer's tax liability in the

> taxpayer's next succeeding taxable year. [italics supplied]

There is no requirement that all citizens be "before a court," or that any overpaid taxpayer make any special post-return remonstrance to the Kansas Department of Revenue. No separate post-return administrative refund claim would affect the citizen-specific numerical information already filed in the Kansas income tax returns of each of the affected single taxpayers. No recomputations of anyone's "Kansas taxable income" are required. The annual returns already filed by the citizens (Kansas income tax forms K-40) disclose (i) who the single taxpayers were, (ii) that they were single, and (iii) what their "Kansas taxable income" was. No system of annual individual income tax collection, aided by employee withholding every payday, and quarterly estimated payments, providing multi-year accountings (annual debits for taxes and forward credits for annual overpayments), *would work*[3] if each citizen had to go to

3. If ministerial examination of a return reveals an overpayment, the return speaks for itself, *as* a refund claim. Likewise, if the tax shown by the return is not timely paid by the taxpayer, officials don't have to sue him to collect. K.S.A. § 79-3235. Employer withholding of income taxes in Kansas eliminates any notion of a volitional element at the time of payment by wage earners (such as petitioner LaFavre). K.S.A. § 79-3296. Self-employed persons seem initially to have greater latitude towards a self-help pre-deprivation remedy (by not paying some of the tax), but as petitioner Merritt discovered, as to his taxable year 1996, a bond equal to 125% of the amount sought to be collected by a Kansas agency ordinarily must be posted for a citizen to secure judicial review of agency action. K.S.A. § 74-2426(d). When respondents asserted a 1996 deficiency, Merritt protested and got a hearing within respondent Kansas Department of Revenue. He found out that respondents think there is no fundamental right to be single and that *Peden*, *infra*, just fixed everything, as of November 6, 1998. Assuming he would lose in further "review" proceedings before the Kansas Board of Tax Appeals, he noticed the bonding requirement for access to the Kansas Court of Appeals (§ 74-2426(d)), and left it alone. By warrant and distraint under K.S.A. § 79-3235, Kansas collected its deficiency for 1996, in January of 1999. Merritt then filed a post-levy "refund claim" for 1996, which resides with respondents, with his claims for 1988-95.

law to get his accounts right, or to get refunds for clear overpayments. K.S.A. § 79-32,100(d); § 79-32,104. Likewise, if officials had to do the same for clear deficiencies.

In their petition for mandamus, ¶ 20, Pet. App. 36a - 37a, petitioners urged that the appropriate "found" or "severed" or saved rates of Kansas income tax chargeable to single persons are the same rates imposed on married persons (1988-1997), to be levied at the respective bracketed levels of Kansas taxable income applicable to joint returns of married persons, divided by two. Such were the mathematics built into the Kansas joint return system, imposed for the best part of four decades ending in 1987. The Kansas legislature abandoned the challenged 1988 regime and has reimposed income taxes under this original mathematical system, from 1998 to the present. 1998 Session Laws of Kansas, Ch. 130, Sec. 19; K.S.A. § 79-32, 110. A single person who derived $10,000 in annual Kansas taxable income (net of deductions and allowances, etc.), during each year of the regime, was "surtaxed" $840 during the ten years of the regime (without interest).

Rote application of administrative law to several hundred thousand Kansans would involve an adversarial process (yet no fact finding or "as applied" interpretation), on a case by case basis[4], on identical claims. Pet. App. E, 57a - 58a. Yet the

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4. Thus, imagine an administrative claims initiation process, mandated for hundreds of thousands of citizens. Nobody exactly knows the right tax rates. One by one, each "claimant": (i) stands on the exact numerical information already filed in her Kansas income tax return, (ii) claims either a God-given right (*viz.*, quoting the advice of St. Paul in I Corinthians 7-9) under the "free exercise" clause of the First Amendment, or a sui generis and inherent "liberty interest" right (protected by secular Blackstonian notions of inherent individual freewill and choice via the due process clause of the XIVth), simply to be and remain single, and thereupon is told (iii) that Kansas revenue officials have found no fundamental right to be and remain single in the Constitution, and that (iv) *Peden v. Kansas*, 261 Kan. 239, 930 P. 2d 1 (Kan. 1996), *cert. den.*, 520 U.S. 1229 (1997) (a low-scrutiny "rational basis" affair, decided solely upon lenient "equal protection" principles), (Cont'd)

ministerial refund statute speaks to the return of *any* taxpayer. Ministers cannot proceed without a judicial order stating what the valid "severed" or "saved" levying rates were; that determination is purely a judicial function. K.S.A. § 79-3239; K.S.A. § 79-32,108. That was another public question. Appendix E, Pet. App. 58a - 61a. *Cf.*, *Virginian Ry. Co. v. System Federation*, 300 U.S. 515, 551-2 (1937).

Redress in this case would be a matter of dollar for dollar restitution of illicit collections measured by the void penalty elements mathematically built into the statutory rate structure[5]. Petitioners believe about 400,000-500,000 single persons are actually involved. The chairperson of the Kansas Senate Assessment and Taxation Committee announced that the average income for single Kansans was $19,000, on February 4, 1997. *Kansas City Star, Metropolitan Section*, February 5, 1997 (distributed in Johnson County, Kansas at large). It was contemporaneously announced that there were 500,000 single Kansas taxpayers and that a "repeal" of the surtax regime in

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(Cont'd)
has shut down her claims. This happened to petitioner Merritt as to 1996; hearings were never even scheduled for his 1988-1995 administrative claims.

5. In *Jackson Co. (Kansas) v. United States*, 308 U.S. 343 (1939), this court held that where the appropriate restitutional remedy was based on due process, treaty, and Fifth Amendment principles, not the Kansas administrative scheme, no interest at local Kansas statutory rates was required. The aggrieved property owner got back *all* the unconstitutionally mulcted money. Local procedure didn't apply. The Tenth Circuit had held that she had not sat on her rights, and local limitations on the local administrative remedy were no valid plea in bar. *Jackson Co. (Kansas) v. United States*, 100 F.2d 929 (10th Cir. 1939), modified as to interest, *supra*. In a case of classic interlocking governmental blunders, actually resolved by principles of unjust enrichment, where there was no available state remedy, see *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 723-25 (1998) (Souter, O'Connor, J.J., concurring specially, as to remand for findings on pre-1983 partial disgorgement). For the end of a long struggle for redress in mandamus, *see Duke v. Turner*, 204 U.S. 623 (1907).

stages, proposed in 1997, would save those taxpayers $41.5 million, per year, when the surtax was finally eliminated. *Ibid.*

* * *

V. Background of the Levies and a Prior Failed Challenge

In 1988, Kansas for the first time installed a set of separate income tax rates, directed solely at single persons, which were legislatively fixed at higher percentages than the rates set for married persons, up and down the graduated income scale. No percentage rate fixed on single persons could be found in the separate Kansas levying statutes directed at married persons. Pet. App. 8a - 9a.

Kansas had never purported to exert any coercive power over the choice of single people as to whether and when to marry. No pari materia evidence exists which would evince any public-minded decision of the 1988 Kansas legislature to imagine or exert any such coercive power. As to marriage, in 1980 and 1990, starting at age 45 and up, there were more Kansas single women than men. Starting at age 55, on up, in 1990, there were 3.28 unmarried women for each single man in Kansas according to the U.S. Census. No sovereign power on earth could have married all of them, by classifying and penalizing according to positive statute law. Originally (in 1933) Kansas (like other jurisdictions) did not even allow joint returns. It taxed individual "taxable income." The point was to raise revenue, not regulate households or lifestyles. Kansas Constitution, Art. 11, § 2. If Kansas had a different "object" in 1988, it never said so. Art. 11, § 5, *ibid.*, would have constrained it to say so.

On April 14, 1993 Eric Peden and Sharon L. Smith challenged the regime in a Kansas district court, raising only a rational basis equal protection claim. But they seemed to come out as winners by late 1995. The trial judge declared the top bracket rates (only those) levied on single taxpayers to be invalid, for lack of a "rational basis." He did not address the entire statutory rate structure levied on all single taxpayers, at all levels of taxable income. Such of the single masses as became aware of the matter were hopeful in 1996; a few filed administrative

refund claims of their own, but most did not. Petitioner LaFavre and many others did not, based on plausible advice as to individual expense. Experience showed that a remedy would come later, as in the prior hard fought episode of the Kansas military retirees, where the legislature[6] had to step in to provide the remedy. K.S.A § 79-32,193. Not that anyone (laymen or lawyers) really knew exactly what to do. *The trial judge had not said what the correct or "saved" tax rates actually were.* Even as to the more prosperous citizens, there was no judicial clue given, as to valid "saved" rates on their top (or lower) bracket levels of income. Nor had the trial judge entered any generalized order as to redress, or depicted any procedure therefor.[7] In 1996 the respondents took an interlocutory appeal to the Kansas Supreme Court.

During 1996, the administrative refund claimants (post-return) received a notice that their claims were denied and that respondents' "judgment" would stand, unless they protested further. Those who protested the "denial" of their "claims" and requested administrative "hearings" (including petitioner

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6. In Kansas, K.S.A. § 79-32,105(b) provides $4,000,000 for ordinary income tax refunds, but that is not enough for 400,000 single people in this case and never was. A staggered reduction of the surtaxes initiated by Kansas in 1997 and the full repeal of the surtax system in 1998 were both enacted on the basis of numbers published by the Kansas legislature indicating lump sum revenue decrements in excess of $30 million, per annum. Those laws affected only the Kansas rate structure, repealing the penalty elements, and taxed single persons under the same rates as married persons. *Cf.*, Kansas Legislature, 1997 Summary of Legislation, Legislative Research Dept. (June, 1997), pp. 104, 138-139; Kansas Legislature, 1998 Summary of Legislation, Legislative Research Dept. (June, 1998), pp. 152, 156. At the end of the administrative line, the $4,000,000 legislative redress fund (administered by respondents) was at all times insufficient to provide restitution for even one taxable year. Petition for mandamus, ¶¶ 1.E, 9, Pet. App. D, 17a, 25a - 26a; Memorandum of Point and Authorities, Pet. App. E, 62a; Motion for Rehearing, Pet. App. F, 68a - 69a, 70a.

7. The trial court merely declared that there was a "class" of top bracket single taxpayers.

Merritt, who filed homemade "claims" for 1988-1995), were then notified by the Kansas Department of Revenue in a form letter captioned "Order Holding Appeal in Abeyance," that (i) Mr. Peden's case on appeal would decide everything, (ii) their post-return claims were put on administrative hold (in "abeyance"), and (iii) they were "bound" until further orders. Respondents (who are not part of any judiciary) falsely represented they had authority to "bind" the claiming citizens, *in personam*, which is believable only to a layman.[8] *Hansberry v. Lee*, 311 U.S. 32 (1940). Petition for mandamus, ¶ 39, Pet. App. 46; *ibid.*; ¶¶ 24-25; Pet. App. 38a - 41a.

On December 20, 1996, the regime was sustained by the Kansas Supreme Court, solely on "rational basis" equal protection analysis; the trial court was reversed. *Peden v. Kansas*, 261 Kan. 239, 930 P. 2d 1 (Kan. 1996), *cert. den.*, 520 U.S. 1229 (1997) ("*Peden*"). Marriage is a good thing for people. Since the "benefits of marriage never end," the top bracket surtax levy on single persons (for example, 7.75% ÷ 6.45% = 20.16% "surtax") could never end as long as a citizen remained single. Addressing the unique statutory rate structure, the Kansas Supreme Court allowed that the top bracket rate difference (only 1.3% since 1992) was not so much. Congress "classifies" married people and single people all the time, differently. Therefore Kansas single persons can be classified "differently." The legislature *might* have wished to *encourage* marriage, based on sociology proffered by the Kansas Department of Revenue. Justice Breyer's recent pronouncement, *Watchtower Bible and Tract Soc. of N.Y., Inc. v. Village of Stratton*, No. 00-1737, __

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8. However, their representations were taken seriously and deterred the further filing or prosecution of post-return claims by accountants. Competent tax accountants inform petitioners that once they heard of respondents' Order, expense factors led them to advise their clients simply to watch and wait. Pursuit of separate claims via hourly-paid counsel would not have been a paying proposition to the average claimant. As a practical matter of public relations, respondents got results with their Order. Nobody besides Mr. Peden has gotten a day in court.

U.S. __ (June 17, 2002), that ". . . we expect a government to give its real reasons for passing an ordinance[,]" was not an obstacle.

Opposing the petition for certiorari filed here, Kansas opened its Brief with a statement to this court that it had "repealed" the statutes. Respondents' Brief in Opposition, *Peden v. Kansas*, S. Ct. Case No. 96-1459, p.1. Thus, *no problem for the future*. *Id.*, pp. 8, 17. In fact Kansas stayed with the surtax system for 1997 (viz., top bracket single persons paid a rate of 7.75%, versus 6.45%, tops, for married persons, a "surtax" of 20.16%). The 1997 law actually depicted only a schedule of rates phasing out the surtax by the year 2000. 1997 Session Laws of Kansas, Ch. 41, Sec. 13 (signed by the Governor on April 4, 1997, just in time to oppose Mr. Peden's petition here). As to the surtax levied for 1997, *see* Pet. App. 12a - 13a. Kansas did not quit levying the surtax until 1998. 1998 Session Laws of Kansas, Ch. 130, Sec. 19.

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These petitioners raise the following unremediated problems for the future: (1) Each single citizen has a running account with respondents, which should be credited by reversing the unconstitutional debits exacted by Kansas, to the extent of the penalty elements of the challenged levies. K.S.A. § 79-32,100(d); § 79-32,104 (2) Mr. Peden was making the wrong argument (3) No citizens are in fact "bound" by any aspect of *Peden* (4) The citizens, being told that the law was "let stand" by respondents, don't know the difference between the folklore of low scrutiny "equal protection" applied *Peden*-style, and a systematic penalty on fundamental rights.

Kansas officaldom will not tell them. Indeed, in the aftermath of *Peden*, and on the eve of the legislative session which produced the actual repeal of the surtax system (in 1998) the Governor of Kansas expounded in the print media that "The fact that single Kansans were paying higher rates was all quite tidy and legal, but many of us had some serious questions about the basic fairness of such a prospect." *The Sun*

Newspapers, Johnson County, Kansas (December 31, 1997), 4A. Within Topeka officialdom, no one's public doubts have extended to the "punitory" effect of the surtax, or to the due process clause or any single persons' fundamental "liberty" interest. After petitioner Merritt filed his post-levy 1996 claim in 1999, he got another "denial" from respondents (to place alongside 1988-1995), with copies of national press reports that *Peden* was "let stand." Respondents further admonished that Merritt could read the opinions of the courts; so he has.

* * *

After denial of certiorari on their "equal protection" matter, the *Peden* plaintiffs were dismissed by the trial court. There was no settlement, no benefit to single taxpayers, no mass global preclusive decree, no notice to citizens at large (re any settlement or opt-outs or identity of the parties, or interventions or res judicata bars or fundamental rights claims or days in court). The *Peden* court had taken the trouble, before it handled the merits, to announce to the public that only 5000 claimants were involved, just a few top bracket folks. The trial court had certified a "class" for purposes of the interlocutory appeal (after first refusing), but actually any statewide or "class tax refunds" were procedurally doomed, since the masses weren't "before the court." *Dean v. Kansas*, 250 Kan. 417, 826 P.2d 1373 (Kan. 1992); *Zarda v. Kansas*, 250 Kan. 364, 826 P. 2d 1365 (Kan. 1992); *Farmers Banshares of Abilene v. Graves*, 250 Kan. 520, 826 P.2d 1363 (Kan. 1992). All the participants in *Peden* had to know it.

On April 15, 1999, these petitioners filed a complaint in the United States District Court for the District of Kansas, challenging the statutory rates. They sought a chancellor. That court dismissed under the XIth Amendment against *all* defendants "for lack of subject matter jurisdiction," likening the whole affair to a retrospective tort claim, without address to the merits, 28 U.S.C. § 1341, or other preclusive doctrine urged by respondents. The United States Court of Appeals for the 10th Circuit likewise affirmed solely for lack of jurisdiction,

on grounds of federalism and the Eleventh Amendment. On appeal, respondents remonstrated that they handle lots of state refund claims all the time (as depicted in *Newsweek, Inc. v. Florida Dept. Rev.*, 522 U.S. 442 (1998) and *Reich v. Collins*, 513 U.S. 106 (1994)), and that *Peden* was in fact a "class action." In the end, the panel was unwilling to see any difference between the ministerial reassessment and forward credits sought by petitioners, and a retrospective adjudication of money liability. This court denied certiorari, *LaFavre, et al. v. Kansas, et al.*, No. 01-624, 534 U.S. 1080, on January 7, 2002. Petitioners commenced their efforts below. Petition for mandamus, ¶ 1.G, Pet App. 18a, *passim*.

REASONS FOR GRANTING THE WRIT

I. This Court Should Decide Whether in the Case of a Statewide Statutory Levy Challenged by Citizens as Void on its Face Under the Fourteenth Amendment, Their Due Process Rights of Access to Court Actually Encompass a Right to Seek Judicial Remediation in Favor of All Afflicted Citizens Against Responsible Officials, "in a Single Action."

Petitioners followed their first constitutional theorem, that X × Y produces a constitutional tax. They challenged X, and sought mass redress. If the citizen Ys can't get to court in one proceeding, their common constitutional chose in action about X is depreciated. Ante, p. 2. The contrary state theorem is that rigid insistence on a multiplicitous refund system is good business. The fact of state collection of a tainted levy *en masse* will become 11/10 of the Constitution. The importance of a citizen test to the state theorem cannot be overstated.

The initial vice below was that petitioners' access to court was thwarted by the selfsame court that has organic original jurisdiction of petitioners' federal substantive constitutional claims. The orders below deny due process, and conflict with *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) (Missouri wrongly rejected "bill in equity"), and *General Oil Co. v. Crain*, 209 U.S. 211 (1908). *See also Logan v.*

Zimmerman Brush Co., 455 U.S. 422 (1982), where officials and the Illinois Supreme Court thwarted the claimant right out of a remedy.

Below, these petitioners sued the right respondents, whose duties *are* to provide redress, in the only court having original jurisdiction. Compare, *Christopher v. Harbury*, No. 01-394, __ U.S. __ (June 20, 2002), Part III. They brought citizens' claims "in a single action." Mandamus and the due process clause were invented for just this, thought petitioners. *Board of Liquidation v. McComb, supra*; *Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); Pfander, James E., *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 Colum. L.R. 1515, 1523-35, 1571-74 (2001) (re nature of the writ); Woolhandler, Ann, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77 (1997), 113 *et seq.*; Woolhandler, Ann, *Patterns of Official Immunity and Accountability*, 37 Case Western L. R. 396 (1987); Jaffe, Louis L., *The Right to Judicial Review*, 71 Harv. L. Rev. 401 (1958).

Patterson, Com'r. v. Gladwin Corp., et al., 2002 Westlaw 1003524, __ So. 2d __ (Ala., May 17, 2002, no. 1001747), illustrates petitioners' problem here. In both cases, respondents can sit on administrative claims multiplicity doctrine, licensed by the state judiciary, to preclude effective citizen access to court (and refunds). A restatement of the first Question Presented in this case is simply whether a lecture on piecemeal procedure and administrative law might suffice as due process where 400,000 or so single citizens are implicated. If it will suffice, then citizens can expect far less from the state judiciary in a case of public fundamental rights, than in a private dispute, *inter sese*. *Cf.*, *Reynolds, et al. v. Beneficial National Bank, et al.*, 2002 Westlaw 655931, __ F.3d __ (7th Cir. 2002) (Posner, J.).

The situation here is not similar to the factual circumstances in *Reich v. Collins*, 513 U.S. 106 (1994) (which involved remediation of indeterminate Ys). Georgia's statutory income

tax rates (a matter of X) were not infirm; officials could at least insist on a taxpayer-initiated post-return administrative refund claim before they could know (i) who was a military retiree, and (ii) the amount of federal pension income he sought to exclude or deduct. The case here is likewise not similar to *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001), where a California statutory administrative remedy met remedial due process standards, in the discrete case of one contractor embroiled in a specific factual dispute with California labor officials over standards on one job.

In a case involving common claims of known citizens, the insistence on multiplicity can only squelch assertion of the citizens' common chose in action. It will deny any realistic possibility of actual "meaningful" refund relief for all citizens afflicted. It is not "simple and effective." *Cf.*, *Tennessee v. Sneed*, 96 U.S. 69, 24 L. Ed. 610 (1877) (mandamus could be denied to one plaintiff, where statutory refund action would work). *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-812 n.3 (1985); *Dodge v. Woolsey*, 59 U. S. (18 How.) 331,15 L.Ed. 401 (1856) (harking to English equity practice); and *Garrett v. Bamford*, 538 F.2d 63 (3d Cir. 1976), *cert. den.*, 429 U.S. 977 (1976), all indicate a completely different due process tradition where known citizens can be remediated.

All officialdom will seek to engage their state courts in a pedantic test of each taxpayer's standing as a Y, or as a well-behaved and dutiful subject. Yet *Reich v. Collins*, *supra*, is clear enough that a citizen does not have to know a tax is unconstitutional at the time he pays it, and that citizens may not be baited or switched out of "meaningful" refund relief. As to common law rights, *see Arkansas Building & Loan Assn. v. Madden*, 175 U.S. 269 (1899) ("The fact that the defendant is a state official is not in itself a defense. . . .); *Shelton v. Platt*, 139 U.S. 591 (1891) ("multiplicity" changes things); *The City of Chicago v. Dows*, 78 U.S. (11 Wall) 108, 112, 20 L. Ed. 65, 67 (1871):

> ". . . the party of whom an illegal tax is collected has ordinarily ample remedy, either by action against the

> officer making the collection, or the body to whom the tax is paid. Here such remedy existed.* * * Nor would he have been compelled to resort to a multiplicity of suits. . . . His entire claim might have been embraced in a single action."

In *Boddie v. Connecticut*, 401 U.S. 371, 377-89 (1971), and *Zablocki v. Redhail*, 434 U.S. 374 (1978), the plaintiffs may not have joined each and every poor person seeking a divorce or all support-delinquent parents seeking a license for re-marriage; the point was that after a judicial holding on the merits, official duty would flow.

Where a statutory tax is collected wholesale, a piecemeal system of retail remedial claims will stultify itself, when all the Ys don't even know the "right tax rates." During the pendency of given single case which challenges an entire statutory rate structure, even if it is publicized, no one else can actually know the "right" rates. Nobody did in Kansas. Taken together, *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999) (upon settlement by those parties after this court's decision) and *Patterson, Com'r. v. Gladwin Corp., et al.*, 2002 Westlaw 1003524, __ So. 2d __ (Ala., May 17, 2002, no. 1001747), also produce the absurdity that no one ten years ago nor anyone today could figure out the "correct franchise tax."

Ab initio, a multiplicitous redress system can only encourage the states to levy and keep tainted money, indefinitely. Yet, that is contrary to due process doctrine of this court, which remediates the citizens. In *County of Lincoln v. Luning*, 133 U.S. 529 (1890), the claimants could not be held to limitations doctrine where redress was directed to a special fund, which was in fact non-existent or inadequate. *See also*, *Beadles v. Smyser*, 209 U.S. 393 (1908) (mandamus not barred where earlier collection steps were impossible; to hold contrary would have stultified prior official acts). *Cf.*, *Stewart Dry Goods Co. v. Lewis (I)*, 287 U.S. 9 (1932) (the General Fund of Kentucky seemed to be insolvent; state statutory remedy not exclusive); *Burrill v. Locomobile Co.*, 258 U.S. 34 (1922) (explicit local

remedy for one corporation was adequately backed by the resources of the state); *Atchison, Topeka & S. F. Ry. Co. v. O'Connor*, 223 U.S. 280, 287 (1912) (plaintiff's constitutional claim was launched against official collector in assumpsit; claim to money was "paramount" to that of the state); *Ward v. Love County (Okla.)*, 253 U.S. 17, 24 (1920) (officials received constitutionally tainted money "for the use and benefit" of multiple claimants); *The City of Chicago v. Dows*, 78 U.S. (11 Wall.) 108, 20 L. Ed. 65 (1871) (relevance of multiplicity).

II. If an Inherent Fundamental Right of Citizens to Be and Remain Single Exists, Antecedent to (or in Tandem with) the Fundamental Right to Marry, Kansas Had No Power to Systematically Surtax All Single People. The Importance of Review Here is to Establish That Equal Protection Lore May Not Be Stretched to Create Such a Power.

A. Griswold's Error

As Dean (and former Solicitor General) Griswold put it: ". . . STATUTES. . . . What are the exact words of the statute? There is no use in thinking great thoughts about a tax problem unless the thoughts are firmly based on the controlling statute." Griswold, Erwin N., *Federal Taxation, Cases and Materials*, Fifth Ed., The Foundation Press, Inc. (Brooklyn, 1960), at p. 15 (footnote omitted). All prior review (and publicity) as to the Kansas regime seems to assume that the Kansas regime merely operated to produce some piddly "disparity" as to a few single persons, just as I.R.C. § 1, 26 U.S.C. § 1, creates some detriments as to some married couples. That is false. *Petitioners do not complain of "differential" graduated income bracketing and decremental results in some cases, in an "equal protection" sense.* The federal lore on the so-called federal marriage penalty is right; but no federal court has confronted anything like the unique rate structure of the Kansas statutes. Kansas invented a brand new system. Likewise, "great thoughts" as to lenient

review in "equal protection" cases do not resolve a surtax on fundamental rights. That is why petitioners' second Question is important.

A consumer sales tax levied at 5% on married purchasers compared to a 6.3% levy on single purchasers might be "different," but would have no constitutional significance, under Kansas style equal protection, per *Peden*. Under due process analysis, it would be a 26% surtax on single people (who have a fundamental right to be and remain so). As to the "burden" of the Kansas surtax regime, petitioners (i) claim that their mathematics are right, and (ii) press the ancient claim that the systematic cumulative bite of the rate structure in K.S.A. § 79-32,110 (1988-1997) was "not close enough for government work." *Associated Industries of Mo. v. Lohman*, 511 U.S. 641 (1994) (Thomas, J.).

B. Lore From the Federal Courts (Griswold's Maxim)

The Constitution grants no federal power to levy a direct systematic financial burden on marriage or upon single people. The First Amendment (as to "free exercise" of religious beliefs as to marriage) and due process protection of fundamental rights (via the secular "liberty interest") would proscribe any such attempt. That is the touchstone of all prior federal courts' examination of I.R.C. § 1, 26 U.S.C. § 1. *Johnson v. United States*, 422 F. Supp. 958 (N.D.Ind. 1976) (*aff'd. sub nom. Barter*, 550 F. 2d 1239 (7th Cir. 1977), *cert. den.*, 434 U.S. 1012 (1978), addresses the so-called federal marriage penalty, and distinguishes the issue presented by the Kansas regime. Since I.R.C. § 1 has never systematically, rate-wise, "penalized" *all* married *or all* single persons, it was easy (and correct) for the district court to hold that both the right to marry and the right of "free exercise of religion" (which are both fundamental and thus joined at the hip) were not systematically burdened. 422 F. Supp. 971, 972, *et seq*. Those taxpayers did not contend (nor could they have contended) that I.R.C. § 1 imposed a direct tax on *all* marriages. 422 F. Supp. at 975.

In *Vivien Kellems*, 58 T.C. 556 (1972), *aff'd. per curiam*, 474 F. 2d 1399 (2d Cir. 1973), *cert. den.*, 414 U.S. 831 (1973), it was obvious that Congress had not intended to regulate, or restrict, or penalize single persons (*qua* single persons)[9]. *Judge Withey's first judicial step was to dismiss that proposition.* 58 T.C. at 558. And that is a boon to our jurisprudence. A federal "singles penalty" existed only in rhetoric. The only way Ms. Kellems could have engineered a 42% singles detriment (under the version of I.R.C. § 1 in effect for the 1965 year at issue) would have been to assume her marriage to a notional man who contributed zero taxable income to the joint enterprise, but supported himself without any money from her. A cipher. If she had married a man who brought his own taxable income to the joint enterprise, in an amount equal to hers, then her share of the joint liability would have been exactly the same as the dollar amount of her actual tax as a single person for 1965. In *Mapes v. United States*, 576 F.2d 896, 901 (Ct. Cl. 1978), *cert. den.*, 439 U.S. 1046 (1978), the court saw that the so-called federal "marriage penalty" is not systematic; it ". . . is suffered not for marrying, but for marrying one in a particular income group." The charts, 576 F.2d at 905, tell the tale. The court published the charts, and did not chant through a series of headnotes. Such would be Griswold's Error.

Here, the rates and mathematics built into the challenged statutory system, see petition for mandamus, ¶ 19, Pet. App. 34a - 36a, tell a completely aberrant tale. Kansas was surtaxing all single people, not graduated income, by levying higher cumulative statutory rates, up and down the line. Single persons were "surtaxed," worse than Christopher Lunding, by operation of the higher statutory percentages levied at the lowest and highest brackets of Kansas taxable income, compared to the rates levied on married persons. The important substantive question is whether Kansas could do it.

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9. The *Peden* court proceeded contrariwise, on the supposition that Kansas might have done that very thing. It chanted out its result in terms of sociological speculation and "lenient" equal protection standards.

C. Burdens on Fundamental Rights

After committing Griswold's Error, one Justice Hodges marshalled many "great thoughts" and wrote a splendid dissent in *Sowders v. Oklahoma Tax Comm.*, 552 P. 2d 698 (Okla. 1976) (at 701):

> "The right to marriage, the right to divorce, and the right to remain single, are basic fundamental human civil rights. The state may not penalize its citizens for making a personal choice concerning their domestic status."

Petitioners contend the same here. The Kansas legislature contrived to make this the right case. Alas, the Oklahoma income tax statute *didn't* systematically penalize all single persons.

When *Peden* was decided on December 20, 1996, it had not occurred to any of the various participants that there is a fundamental liberty interest *inherent in the citizens themselves*, absolute, protected by the First Amendment and the due process clause of the Fourteenth Amendment: to be and remain single, which is a corollary of the right to marry, as a matter of their own choice. *Cf.*, *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (Part II, Warren, C. J., discoursing on the fundamental right to marry, or not to marry). Petitioners seek to bring that case. Petition for mandamus, ¶ 11.D, and n.1, Pet. App. 29a - 30a.

Blackstonian notions of secular inherent "freewill" (not mere *relative* rights), which we call "liberty," didn't intrude into the "rational bases" the contenders found (or didn't find) for the levies. Contra, *Blackstone's Commentaries on the Laws of England (1765), Legal Classics Library (Birmingham, 1983), Book One, Ch. I, "The Rights of Persons,"* 119-122. It was "freewill" which inhered in natural persons "as single individuals" which defined liberty for Blackstone. *Ibid.* As of 1791, or during 1868-2002, his equation of "liberty" with "freewill" has not been improved. *State v. Gowdy*, 62 Mont. 119, 203 P. 1115 (Mont. 1922) (striking a $5 head tax on bachelors where heads of families were taxed $2), and the "punitory" effect of the tax on those who did not wish to marry, or couldn't, was likewise unnoticed.

Structurally, family matters are generally left to the states via the Tenth Amendment. *Cf.*, *Bailey v. Drexel Furniture Co.* (the Child Labor Tax Case), 259 U.S. 20 (1922). However, where the states trench too far against fundamental rights of citizens of the United States, the Ist and Fourteenth Amendments operate to vindicate individuals' *own* rights against all government. *Cf.*, *Savings & Loan Assn. v. Topeka*, 87 U.S. (20 Wall.) 655, 22 L.Ed. 455 (1875) (Miller, J.) (no government would have unilateral prerogative to void the marriage of A and B).

Low scrutiny "rational basis" equal protection lore is simply not germane to the fundamental inherent citizens' "liberty" interest asserted here, under due process. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), struck a rational Louisiana tax which could easily have been sustained if the reviewing court made up its mind to forget the First Amendment, and thereupon assumed a state regulation of commercialism in print media. In *Truax v. Raich*, 239 U.S. 33 (1915), if the reviewing court forgot "due process" (as well as the Austrian Treaty) and assumed that the Supreme Good was to protect jobs for native Arizona residents, then the alien disemployment law and penalties were fine. In *Brown v. Maryland*, 25 U.S. (12 Wheat.) 419 (1827), if Chief Justice Marshall forgot the "no state shall" mandate of Article I, Sec. 10 of the Constitution, then the Maryland import tax was sensible.

As Justice Kennedy noted in *Simon & Schuster v. N.Y.S. Crime Victims Bd.*, 502 U.S. 105, 124-128 (1991) (concurring), if a Ist Amendment right is involved (which should be the first analytical step), a "compelling state interest" analysis can wander far beside the point. *See also Republican Party of Minnesota, et al. v. White*, No. 01-521, __ U.S. __ (June 27, 2002) (Kennedy, J., concurring), involving restrictions ". . . beyond the power of government to impose." It is not enough for a reviewing court to arrive at the aperçu that itinerant single monks or roving single troubadours are a different kettle of fish from Mr. and Mrs.

Nelson, and then sustain a statutory 20% surtax on the monk's benefice or the troubadour's tips. As Professor Fuller observed:

> "The drawing of distinctions is certainly not an activity which can be justified as an end in itself. If I were to write a long treatise devoted to developing and maintaining a sharp distinction between the concepts 'pie' and 'cake,' disposing definitively of all the hard borderline cases, like Boston cream pie and upside-down cake, I could scarcely look forward to being congratulated on my contribution to the clarification of a difficult subject."

Fuller, Lon L., *The Law in Quest of Itself*, Beacon Press (Boston, 1966) (rep. 1999, 2000, The Lawbook Exchange, Ltd.), 86. Logical proofs that pie is good would not create police power, ipse dixit, for Kansas to surtax the creation or purchase of wedding cakes. The issue would be about weddings, not pie. *Peden* notwithstanding. *Western Union Telegraph Co. v. Kansas*, 216 U.S. 1, 38 (1909) (regulatory rights do not include "hostility to rights secured by the supreme law of the land.").

III. The Rejection Below Terminated Petitioners' Constitutional Claims, and Thereby Denied Due Process to Petitioners. Other Doctrine Explained in *Richards v. Jefferson County*, *supra*, and *South Central Bell Tel. Co. v. Alabama*, *supra*, was Ignored, in That the Due Process Implications of Any Affirmative Preclusive Defenses Respondents Might Have Urged Cannot Be Reviewed in this Court, Except by Speculating.

Petitioners cannot banish the thought that Justice Scalia's insight in *Kansas v. Crane*, No. 00-957, __U.S. __ (January 22, 2002), might apply here ("There is an obvious lesson here for state supreme courts that do not agree with our jurisprudence: ignoring it is worth a try"). "What's the constitution between friends?" has some roots in the Topeka tradition. *State v. Atherton*, 139 Kan. 197, 209-10, 30 P.2d 291, 299 (Kan. 1934).

The action below squelches citizens' own assertion of their federal rights to an adjudication of their claims under the

Fourteenth Amendment. It is directly contrary to the due process tradition explicated in *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930) (Missouri Supreme Court's denial of bill in equity and rejection of federal question raised on motion for rehearing denied due process; taxpayers were not dummies), and in *General Oil Co. v. Crain*, 209 U.S. 211, 226-28 (1908). The only institution petitioners have confronted with the basic question, to actually respond, is the Kansas Department of Revenue ("there is no fundamental right to be single"), as of November 6, 1998. Pet. App. 46a - 47a. All Kansans have a right to hear that from a court.

The termination of the petition below is reminiscent of the shut-down in the Alabama Supreme Court, depicted in *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999), which those taxpayers challenged (first question) on certiorari. It is clear enough that "due process" mandates both judicial and financial redress. *Newsweek, Inc. v. Florida Dept. Rev.*, 522 U.S. 442 (1998) (Florida was in the habit of telling the federal courts all about state remedies, but was denying "access to refunds" in the Florida system); *Richards v. Jefferson County*, 517 U.S. 793 (1996) (spurious Alabama style res judicata applied against non-parties to prior failed tax challenge); *Reich v. Collins*, 513 U.S. 106, 109-114 (1994) (taxpayers were not dummies; invalid "bait and switch" regime); *McKesson v. Division of Alcoholic Beverages*, 496 U.S. 18, 51 n.35 (1990) (irrelevant that refunds were distasteful to Florida). Petitioners think that Mr. Peden and Ms. Smith are the only persons bound by *Peden. Commissioner v. Sunnen*, 333 U.S. 591 (1948).

Limitations on filing post-return administrative claims (which seek to change particular taxpayer information about Y) are irrelevant. *Cf.*, *Duke v. Turner*, 204 U.S. 623 (1907). Petitioners urged that respondents may not rely on limitations in the face of systematic misrepresentations and denials of due process-mandated remedial rights. Petition for mandamus, ¶¶ 22-26, Pet. App. 38a - 41a; ¶¶ 38 - 42, Pet. App. 46a - 48a. Remediation would be pursuant to constitutional principles, not

local "administrative law." *Montana v. Crow Tribe of Indians*, 523 U.S. 696, 723-5 (1998); *Jackson Co. (Kansas) v. United States*, 100 F. 2d 929 (10th Cir. 1939), *mod.*, 308 U.S. 343, (1939); *Ward v. Love County (Okla.)*, 253 U.S. 17, 22-24 (1920) (neither local law nor payment over to state excused collection of void taxes and denial of state redress); *Atchison, Topeka & S. F. Ry. Co. v. O'Connor*, 223 U.S. 280, 287 (1912) (plaintiff's constitutional claim was "paramount" to that of the state).

But it is anyone's guess why the court below did what it did with any of the federal questions raised by the petition for mandamus.

CONCLUSION

If the court decides to review the federal questions raised here, it could grant certiorari, and at the same time vacate the final judgment below and remand to the Supreme Court of Kansas for further proceedings entailing consideration of both the substantive and the remedial due process claims asserted by petitioners below. *Cf.*, *Newsweek, Inc. v. Florida Dept. Rev.*, 522 U.S. 442 (1998). Alternatively, as in *South Central Bell Tel. Co. v. Alabama*, 526 U.S. 160 (1999), and in *General Oil Co. v. Crain*, 209 U.S. 211 (1908), the court could grant the writ as to both Questions Presented, decide those questions itself after briefing and argument, and remand for further proceedings and remediation. Petitioners will have been provided a forum if the court will adopt either course, and pray for relief on this petition by such order as the court shall see fit to make.

Respectfully Submitted,

J. Scott Merritt, Jr.
Attorney for Petitioners
1708 Commerce Tower
P.O. Box 13222
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(816) 472-6611
(913) 649-6097

July 24, 2002

APPENDIX A — ORDER OF THE SUPREME COURT OF THE STATE OF KANSAS DENYING PETITION FOR WRIT OF MANDAMUS AND ORDER FOR REASSESSMENT DATED MARCH 20, 2002

IN THE SUPREME COURT
OF THE STATE OF KANSAS

JAMES S MERRITT JR
1708 COMMERCE TOWER
PO BOX 13222
KANSAS CITY MO 64199-3222

CASE NO. 02-88431-S

CAROLYN A. ("HOWERTER") LA FAVRE AND JAMES SCOTT MERRITT, JR., ON BEHALF OF THEMSELVES AND ALL SINGLE KANSAS INCOME TAX PAYERS,

PETITIONERS,

v

KANSAS DEPARTMENT OF REVENUE, A KANSAS AGENCY C/O CARLA J. STOVALL, OFFICE OF THE ATTORNEY GENERAL; ET AL.,

RESPONDENTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

PETITION FOR WRIT OF MANDAMUS AND ORDER FOR REASSESSMENT BY CAROLYN LA FAVRE AND JAMES MERRITT.

Appendix A

DENIED. MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS IS NOTED.

DATE: 03/20/2002.

CAROL G. GREEN
CLERK

APPENDIX B — ORDER OF THE SUPREME COURT OF THE STATE OF KANSAS DENYING MOTION FOR REHEARING TO VACATE DISMISSAL AND FOR PRE-HEARING CONFERENCE DATED APRIL 25, 2002

JAMES S. MERRITT JR
1708 COMMERCE TOWER
PO BOX 13222
KANSAS CITY MO 64199-3222

CASE NO. 02-88431-S

CAROLYN A. ("HOWERTER") LA FAVRE AND JAMES SCOTT MERRITT, JR., ON BEHALF OF THEMSELVES AND ALL SINGLE KANSAS INCOME TAX PAYERS,

PETITIONERS,

v

KANSAS DEPARTMENT OF REVENUE, A KANSAS AGENCY C/O CARLA J. STOVALL, OFFICE OF THE ATTORNEY GENERAL; ET AL.,

RESPONDENTS.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING AND TO VACATE DISMISSAL AND FOR PRE-HEARING CONFERENCE BY MERRITT AND LAFAVRE.

Appendix B

CONSIDERED BY THE COURT AND DENIED. RESPONSE AND REPLY TO RESPONSE ARE NOTED.

DATE: 04/25/2002.

CAROL G. GREEN
CLERK

APPENDIX C — CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const., Amend. XIV, § 1

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * *

Kansas Constitution, Art. 3, § 3

§ 3. Jurisdiction and terms. The supreme court shall have original jurisdiction in proceedings in quo warranto, mandamus, and habeas corpus; and such appellate jurisdiction as may be provided by law. It shall hold one term each year at the seat of government and such other terms at such places as may be provided by law, and its jurisdiction shall be co-extensive with the state.

* * *

Kansas Bill of Rights; § 3

§ 3. Right of peaceable assembly; petition. The people have the right to assemble, in a peaceable manner, to consult for their common good, to instruct their representatives, and to petition the government,

or any department thereof, for the redress of grievances.

* * *

Kansas Constitution, Art. 2, § 16

§ 16. Subject and title of bills; amendment of revival of statutes. No bill shall contain more than one subject, except appropriation bills and bills for revision or codification of statutes. The subject of each bill shall be expressed in its title. No law shall be revived or amended, unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed. The provisions of this section shall be liberally construed to effectuate the acts of the legislature.

* * *

K.S.A. § 60-801

60-801. Nature of mandamus. Mandamus is a proceeding to compel some inferior court, tribunal, board, or some corporation or person to perform a specified duty, which duty results from the office, trust, or official station of the party to whom the order is directed, or from operation of law.

* * *

Appendix C

K.S.A. § 79-32,105(a)-(c)

Sec. 79-32,105. Same; refunds; distribution of tax. —

(a) The director shall pay to the treasurer of the state daily the entire amount collected during the preceding day, under the provisions of this act and from the income tax imposed upon individuals, corporations, estates or trusts pursuant to the "Kansas income tax act" less amounts withheld as provided in subsection (b) . . . which amounts shall be credited to the state general fund.

(b) A revolving fund, designated as "income tax refund fund" not to exceed $4,000,000 shall be set apart and maintained by the director from income tax collections, withholding tax collections, and estimated tax collections and held by the state treasurer for prompt payment of all income tax refunds and for the payment of interest as provided in subsection (e). The fund shall be in such amount, within the limit set be this section, as the director determines is necessary to meet current refunding requirements under this act.

(c) If the director discovers from the examination of the return, or upon claim duly filed by the taxpayer or upon final judgment of the court that the income tax, withholding tax, declaration of estimated tax or any penalty or interest paid by or credited to any taxpayer is in excess of the amount legally due, the director shall certify to the director of accounts and reports the name of the taxpayer, the amount of refund

and such other information as the director may require. Upon receipt of such certification the director of accounts and reports shall issue a warrant on the state treasurer for the payment to the taxpayer out of the fund provided in subsection (b), except that no refund shall be made for a sum less than $5, but such amount may be claimed by the taxpayer as a credit against the taxpayer's tax liability in the taxpayer's next succeeding taxable year.

* * *

Civil Rights Act, 42 U.S.C. § 1983

§ 1983. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

K.S.A. § 79-32,110 (L. 1988, ch. 38, § 2)

"79-32,110. Tax imposed; classes of taxpayers; rates. (a) *Resident Individuals.* Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of

every resident individual, which tax shall be computed in accordance with the following tax schedules:

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $35,000	4.05% of Kansas taxable income
Over $35,000	$1,418 plus 5.3% of excess over $35,000

(2) *All other individuals.*

If the taxable income is:	The tax is:
Not over $27,500	4.8% of Kansas taxable income
Over $35,000	$1,320 plus 6.1% of excess over $27,500

* * *

K.S.A. § 79-32,110 (L. 1989)

"79-32,110. Tax imposed; classes of taxpayers; rates. (a) *Resident Individuals.* Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

Appendix C

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not Over $35,000=	3.65%of Kansas taxable income
Over $35,000=	$1,278 plus 5.15% of excess over $35,000

(2) *All other individuals*

If the taxable income is:	The tax is:
Not over $27,500=	4.5% of Kansas taxable income
Over $27,500=	$1,238 plus 5.95% of excess over $27,500

K.S.A. § 79-32,110 (L. 1992, ch. 280, § 55)

On July 1, 1992, K.S.A. 79-32,110 is hereby amended to read as follows: 79-32,110. (a) Resident Individuals. Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

Appendix C

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $30,000	3.5% of Kansas taxable income
Over $30,000 but not over $60,000	$1,050 plus 6.25% of excess over $30,000
Over $60,000	$2,925 plus 6.45% of excess over $60,000

(2) *All other individuals.*

If the taxable income is:	The tax is:
Not over $20,000	4.4% of Kansas taxable income
Over $20,000 but not over $30,000	$880 plus 7.5% of excess over $20,000
Over $30,000	$1,630 plus 7.75% of excess over $30,000

* * *

K.S.A. § 79-32,110 (1996 Supp.)

"79-32,110. Tax imposed; classes of taxpayers; rates. (a) *Resident Individuals.* Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

Appendix C

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $30,000	3.5% of Kansas taxable income
Over $30,000 but not over $60,000	$1,050 plus 6.25% of excess over $30,000
Over $60,000	$2,925 plus 6.45% of excess over $60,000

(2) *All other individuals.*

If the taxable income is:	The tax is:
Not over $20,000	4.4% of Kansas taxable income
Over $20,000 but not over $30,000	$880 plus 7.5% of excess over $20,000
Over $30,000	$1,630 plus 7.75% of excess over $30,000

K.S.A. § 79-32,110 (L. 1997, ch. 41, § 13)

1997 Session Laws of Kansas, Ch. 41, § 13 (signed by the Governor on April 4, 1997):

Sec. 13. On July 1, 1997, K.S.A. 1996 Supp. 79-32,110 shall be and is hereby amended to read as follows: 79-32,110. (a) *Resident Individuals.* Except as otherwise provided by subsection (a) of K.S.A. 79-3220, and amendments thereto, a tax is

Appendix C

hereby imposed upon the Kansas taxable income of every resident individual, which tax shall be computed in accordance with the following tax schedules:

(1) *Married individuals filing joint returns.*

If the taxable income is:	The tax is:
Not over $30,000	3.5% of Kansas taxable income
Over $30,000 but not over $60,000	$1,050 plus 6.25% of excess over $30,000
Over $60,000	$2,925 plus 6.45% of excess over $60,000

(2) *All other individuals.*

(A) *For tax year 1997:*

If the taxable income is:	The tax is:
Not over $20,000	4.1% of Kansas taxable income
Over $20,000 but not over $30,000	$820 plus 7.5% of excess over $20,000
Over $30,000	$1,570 plus 7.75% of excess over $30,000

* * * *

APPENDIX D — PETITION FOR WRIT OF MANDAMUS AND ORDER FOR REASSESSMENT, FILED IN THE SUPREME COURT OF THE STATE OF KANSAS ON FEBRUARY 6, 2002

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. _____

CAROLYN A. ("HOWERTER") La FAVRE, and JAMES SCOTT MERRITT, JR., on behalf of themselves and all single Kansas income tax payers,

Petitioners,

v.

KANSAS DEPARTMENT OF REVENUE, a Kansas Agency (c/o Carla J. Stovall, office of the Attorney General of Kansas 301 S.W. 10th Street Topeka, Kansas 66612),

TIM SHALLENBURGER, as State Treasurer of Kansas (900 S.W. Jackson Suite 201 North Topeka, Kansas 66612),

STEPHEN S. RICHARDS, Secretary of Revenue of the Kansas Department of Revenue (Kansas Dept. of Revenue 915 Harrison Street, 2nd Floor Docking State Office Building Topeka, Kansas 66612-1588),

JEFFREY LOCHOW, Director of Division of Taxation of the Kansas Department of Revenue (Kansas Dept. of Revenue 915 Harrison Street, 2nd Floor Docking State Office Building Topeka, Kansas 66612-1588),

Appendix D

DAVID J. HEINEMANN, as agent and designee of Secretary of Revenue and of Director and Division of Taxation of Kansas Department of Revenue (Kansas Dept. of Revenue 915 Harrison Street, 2nd Floor Docking State Office Building Topeka, Kansas 66612-1588),

Respondents.

PETITION FOR WRIT OF MANDAMUS AND ORDER FOR REASSESSMENT

1.A. Petitioners prosecuting this suit were single during some or all the taxable years at issue (1988-1997), and are citizens of Kansas and the United States under the XIVth Amendment to the United States Constitution. They bring this suit in equity on behalf of themselves and all single (natural) persons who were assessed Kansas income taxes for any of the taxable years 1988-1997. During the taxable years 1988-1997, such single persons derived Kansas taxable income, from the same sources as married persons, by various means, through the direct or indirect employment of their labor or their capital, or otherwise, and paid purported Kansas income taxes thereon to respondents. Petitioners assert that they exist as single persons and earn income by virtue of no special act, grace, license, sufferance, or abstract power of classification or prerogative of the Kansas Legislature or the respondents.

1.B. To save this court's time, petitioners aver, concede, and stipulate that the religious and civil institution of

voluntary marriage between man and woman is a good thing. This court has already held that. Petitioners do not complain that marriage is bad. *Petitioners have a constitutionally protected fundamental right to be and remain single, however, which was surtaxed, with mathematical precision, under K.S.A. § 79-32,110 (1988-1997).* A state may not impose an explicit surtax, or penalty, or levy or charge, for the enjoyment of a fundamental right granted by the federal constitution. Kansas sought to do just that via those statutes, for such years. Respondents have already collected the money.

1.C. The goodness or distinctness of the marriage relation (as a simple basis of "classification") does not resolve petitioners' federal and Kansas constitutional claims, based on their own liberty interest, recognized under substantive due process principles, which are raised herein. Petitioners' claims involve the invalidation of separate, mathematically and systematically excessive, discriminatory, constitutionally burdensome, and therefore facially void levies and penalties and exactions (cast in the form of statutory "income taxation") against all single persons, by Kansas, pursuant to K.S.A. § 79-32,110 (1988-1997).

1.D. Failing this court's exercise of original jurisdiction to hear petitioners' equitable claims on the merits, single taxpayers are disremediated, contrary to procedural due process principles (involving citizen access to court and effective redress) found in the XIVth Amendment. Statutory and administrative procedures to secure credits or refunds to the masses of afflicted single taxpayers are inadequate, since refund relief is limited, individual case by individual case, under current Kansas judicial doctrine. *Kansas levies income*

taxes wholesale from all the single citizens; but a retail individualized system of administrative claims remedies (requiring claim by claim "hearings" and review) simply doesn't work where the levying statute is void on its face. The challenged "tax" laws have already been administered. The real question is practical state wide remedies.

1.E. In addition, the statutory special fund for individual income tax refunds maintained by respondents under K.S.A. § 79-32,105(b) has been limited to $4,000,000 at all relevant times herein, year by year. All single taxpayers, regardless of any notional "administrative procedure" they might have followed, could never have secured redress from the fund, since the annual overassessments representing the "penalty" element imposed by the levying statutes have annually exceeded such $4,000,000. Cf., Kansas Legislature, 1997 Summary of Legislation, Legislative Research Dept. (June, 1997), pp. 104, 138-139; Kansas Legislature, 1998 Summary of Legislation, Legislative Research Dept. (June, 1998), pp. 152, 156.

1.F. The legislative reduction and repeal of the surtax levies (in 1997 and 1998 respectively) finally resulted in a constitutional regime in 1998, and restored mathematics that worked the same as the original Kansas regime (1933-1987). The foregoing official information on resulting Kansas revenue decrements was published by the legislature itself (when it abandoned the "surtaxes") and establishes this much: (i) as of 1997, a full restoration of parity in rates was projected (through 2000) to entail annual restoration of $34.7 million to single taxpayers; and (2) as of 1998, the legislature's establishment of immediate rate parity, ahead of the 4 year

phase-down schedule originally enacted in 1997, resulted in a total of $30.9 million in projected annual tax restoration to single taxpayers. The projected Kansas revenue decrements *were* the unconstitutional penalty numbers. Against such numbers, $4,000,000 in the statutory refund fund would never have been adequate; there was never any remedy which would restitute the taxes of all single taxpayers, simply by looking to "administrative procedure" and K.S.A. § 79-32,105(b), dollar for penalty dollar. Then and now, only equitable redress will work. *In this case, if every single taxpayer had followed straight administrative procedure all the way to appellate review, and won, they would have found an exhausted statutory refund fund.*

1.G. Lastly, a restitutional remedy in federal district court does not exist. See section 43 hereof. This court is the Kansas tribunal of last resort, and the prerogative equitable writ of mandamus leading to reassessment (on the basis of valid "saved" rates) is the appropriate state wide remedy.

2.A. The named and class petitioners herein have been at all relevant times, and as of filing this Petition are now, residents and domiciliaries of Kansas. During some or all of the years at issue, petitioners filed annual Kansas income tax returns (form K-40), as single persons, and paid amounts computed and designated thereby as "income taxes" to the respondent Department of Revenue. The original putative income taxes were assessed by the Department from information in the returns, by simply checking the numbers. Under the present system of return-based administration of its income tax laws, therefore, Kansas has already levied, assessed and collected such amounts (including the "penalty"

element) via the offices and agencies of the named respondents (and Departments and Divisions). Such amounts were computed pursuant to the separate statutory "single" graduated income tax rates, and in many cases under tables reflecting such rates, all of which were published and distributed to taxpayers (and represented as valid law) in pamphlet form by the respondent Kansas Department of Revenue.

2.B. At all levels of Kansas single individuals' taxable income (compared to commensurate levels of married persons' taxable income, per capita), there is a cumulative targeted burden (or "penalty") on *all* single persons' income, explicitly imposed by such statutory rates themselves. Such statutory burden functions as a "surtax," or "penalty," is systematic, and is mathematically inexorable in all cases. It is not comparable to the "disparities" in dollar amounts of actual tax levied by I.R.C. § 1, 26 U.S.C. § 1, which "disparities" result from differential graduated bracketing of taxable income of married and single taxpayers. Petitioners' case is about a systematic statutory surtax or penalty on *all* single persons exacted and levied by Kansas. The systematic mathematics are depicted at section 19 hereof. This case is not about disparate income bracketing based on Congressional judgments as to "ability to pay" of married citizens in higher graduated brackets of income.

JURISDICTION

3.A. Original jurisdiction over petitioners' substantive claims and the judicial power to order the requested mass relief against the respondents herein is founded on

Appendix D

Kansas Constitution Article 3, § 3; K.S.A. § 60-801; K.S.A. § 79-3230(d); K.S.A. § 79-32,105(a)-(c), and the concurrent federal question jurisdiction inherent in this court over claims asserting citizens' own fundamental rights arising under the United States Constitution (including a right of practical access to court). Under the facts and circumstances of this case, this court's exercise of plenary jurisdiction over claims brought herein for a remedial Order for reassessment, leading to income tax credits or monetary relief for all single taxpayers, pursuant to this Petition, is necessary for effective relief, after a full and fair resolution of petitioners' constitutional claims, under the due process clause of the XIVth Amendment.

3.B. Ordinary doctrine of "administrative law and procedure" is inapplicable to this case. The fundamental right to pursue relief in this court (on behalf of all Kansas single taxpayers) is founded upon the right to sue for effective redress in an impartial judicial tribunal under the due process clause of the XIVth Amendment, and upon the Kansas Bill of Rights, § 3; ibid., § 18. The public questions requiring address by this court are (1) *whether Kansas actually recognizes a fundamental inherent right of citizens of the United States to be and remain single*, and (2) *whether* under procedural due process principles, in the case of a void statewide levy explicitly imposed on all single taxpayers, where the relevant citizens' assessment information is already filed with the Department of Revenue, *several hundred thousand single people are exclusively relegated to Kansas bureaucracy to even initiate any proceeding for equitable redress*. The questions are public and unusual because before the 1988 Kansas Legislature managed it, no state has ever contrived to adopt a general income tax law affecting

hundreds of thousands of its citizens all in the same way, which is unconstitutional on its face.

4. Petitioners herein seek equitable relief in the form of an Order against defendants for a reassessment of valid Kansas income taxes, on all single persons, leading to a money refund from Kansas of the unconstitutionally and illegally levied and retained excessive amounts which were collected, assessed, used and retained by respondents herein, from single income tax payers of Kansas, for all the years 1988-1997, *or forward credits therefor*. This would be based on taxpayer information already in respondents' files. Then, "agency action" could begin.

5.A. Petitioner Merritt initially pursued state administrative remedies seeking Kansas refunds (for 1988-1995). Petitioner LaFavre followed no such path (as was the case with most others). Such remedies are simply not affordable, citizen by citizen. Cf., *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). Because of the expense, length, and the ultimate substantive inadequacy of Kansas administrative remedies, as literally prescribed by Kansas administrative law and doctrine (where the relevant purported state legislative acts are asserted to be void as a matter of Kansas law or where the statute is challenged as facially unconstitutional), such remedies are meaningless, and would not lead to group-wide or class refund relief, absent an act of the Kansas Legislature. Merritt now has a further 1996 refund claim pending before respondent Heinemann. "Agency action" thus far is limited to collection of taxpayers' money, which respondents have well and truly done. There is no point in reviewing that; it is complete. When this court issues the requested Writ, and Order, then

respondents will actually perform their ministerial duties, and restitute the penalty element built into the challenged statutes, which is still the single citizens' money.

5.B. Neither the Kansas Department of Revenue nor the Board of Tax Appeals has judicial jurisdiction or competency to declare the "tax" unconstitutional on its face. There is no further administrative action they can take, and they have no constitutional power to void a statute. Yet respondents have purported to direct and control an "administrative" refund remedy, via the acts of various respondents acting under color of Kansas law, which leads only to more "review" of administration. Any prospect of a plain, efficient or speedy "administrative" or judicially sanctioned reassessment remedy, or equitable group or statewide class refund relief, will founder under current Kansas judicial practice, which in fact *demands* a multiplicity of separate little claims and administrative review proceedings. Access to Kansas trial courts (or the Kansas Court of Appeals) is currently blocked by rigid application of this doctrine. Cf., *Zarda* v. *Kansas*, 250 Kan. 364, 826 P.2d 1365 (Kan. 1992); *Dean* v. *Kansas*, 250 Kan. 417, 826 P. 2d 1373 (Kan. 1992); *Farmers Banshares of Abilene* v. *Graves*, 250 Kan. 520, 826 P.2d 1363 (Kan. 1992).

6. The "administration" to be done by the Kansas Department of Revenue in this matter, in fact, should only be to effectuate the reassessment order and the refunds or credits sought herein, after the "singles surtax" is judicially held to be unconstitutional. Current Kansas practice would require more bureaucratic "administration," but such would not be simple, plain, speedy or effective. It would be

pointless. As to members of the petitioner single taxpayer class who have not filed administrative refund claims to date, based on petitioner Merritt's actual experience, and that of others, pursuit of such claims would be prohibitively expensive, futile, pointless, and detrimental to their interests. Kansas' clear financial interest lies in obfuscation, denial and delay.

7.A. Respondents have sought to mislead and mis-direct all single taxpayers of Kansas into the belief that their extant claims for refunds were being or have been fully and fairly litigated in the courts of Kansas (which they in fact and in law have not been). Whether as *choses in action* or as formal claims, respondents have sought to extinguish citizens' remedial rights *by administrative dissemination of administrative dis-information*. Respondents have sought thereby to deter such Kansas single taxpayers from thinking through and asserting their own personal fundamental constitutional rights and interests and their own monetary claims based on the organic and facial invalidity of the tax bills complained of.

7.B. Respondents, holding public offices of trust, have published to their own taxpayers the representation that they can render "judgments" on denied administrative refund claims. They have published the representations (directly to administrative hearing refund claimants) that their "orders" were "*binding*" until there is a ". . . final resolution by the Kansas appellate court system . . . ." They falsely represented that *Peden*, which did not involve an assertion or adjudication of Kansas single taxpayers' fundamental rights (to be and remain single) was dispositive. Such representations also

implied that respondent Department (which is not part of any judiciary) solely controls the claims route and the remedy, via "administration." Yet the claims here are not factual, or "as applied."

7.C. Coming from public officials in positions of trust, these representations are in violation of respondents' duties of candor and fairness to their own citizens, besides being totally wrong as to respondents' authority and as to federal due process standards governing the doctrine of *res judicata*. *The two Peden taxpayers had their day in court. All Kansas single taxpayers have most decidedly not, on the issues raised here.* The result, *inter alia*, is a denial of procedural due process to Kansas single taxpayers under the XIVth Amendment to the United States Constitution, if this court will not hear this separate case. Petitioners' claims are further cognizable here under 42 U.S.C. § 1981(a) and (c) and 42 U.S.C. § 1983 (which prescribes a "suit in equity" without particulars as to the court, or the identity of the defendant; as does K.S.A. § 79-3230(d)).

7.D. Respondents have no license to play procedural games with their own citizens; the issue is effective citizen access to court. The claims and the situation will indicate the right defendants, clearly enough. K.S.A. § 79-3230(d) was enacted in 1933 as a remedial matter for citizens, in the real world, without detail as to the defendants *or* the court. It is not a useless artifact.

8. The results to date are that (i) an entire class of Kansas single taxpayers who were not in the "top brackets" of taxable income reached by the purported laws at issue, for any or all

of the relevant years (1988 to 1997), remain unaware of their extant reassessment and monetary claims (and thus such class has been unrepresented and its fundamental rights and liberty interests are unheard), (ii) a purported class of Kansas single taxpayers who raised the low-scrutiny "equal protection" claims decided in *Peden* (had they received any published notice whatsoever) were mis-led into believing that their monetary claims were limited by "top bracket" tax rate discrimination only, and that (iii) all Kansas single taxpayers were lulled, misinformed and deterred into doing nothing, or into merely filing meaningless administrative refund claims (which led only to an allegedly "binding" Departmental halt). Kansas has seemed to achieve a "taking" of their property via collection and retention of invalid levies on single persons. Respondents act as though it's all spilt milk; petitioners maintain that the levy was and is still invalid under the due process clause of the XIVth Amendment and under the "just compensation" clause of the Vth Amendment. Redress lies in this court, or there is a coordinated state taking.

9.A. As to the actual possibility of refunds, the administrative system itself was never adequately funded. The separate fund (for income tax refunds) maintained under K.S.A. § 79-32,105(b) is limited to $4,000,000, which literally means that refunds could not be paid by respondent Department, even if each and every single person had followed strict administrative procedure. See section 1 hereof. The Legislature will have to act, or this court can order credits. Such was the practical situation which led to the enactment of K.S.A. § 79-32,193 in 1995, as to the

military retirees. It calls for equitable relief here; the "penalties" still belong to the single citizens. Limitation doctrine can't apply where a prescribed remedy at law was fictive.

9.B. The obvious financial windfall to the Kansas fisc has been that, as new income taxes (including the "singles' surtax") were collected from single persons for each fresh year, through 1997, notional administrative procedure arguments would exonerate Kansas from responsibility for reassessment and refunds or credits to all Kansas single taxpayers. The results have been (i) that Kansas is unjustly enriched, *and* (ii) the creation of a constructive or resulting state pool of financial liquidity, equitably still belonging to the citizens who paid it in, now administered by respondent State Treasurer. The financial benefit of such pool (or constructive fund) has been sequestered to Kansas, as long as respondents can deter and forfend the bringing of reassessment and monetary refund claims by single taxpayers in a proper judicial forum. The circumstances here call for equitable intervention, and the impressment of a constructive or resulting trust over the wrongfully collected penalties. Otherwise the unjust enrichment present here amounts to a colossal "taking," both of the citizens' money and any viable remedy, under the Vth Amendment. *Cary* v. *Curtis*, 44 U.S. (3 How.) 236, 11 L.Ed. 576 (1845).

9.C. Respondent State Treasurer is a party because he is in control of citizens' own funds, against whom relief can be granted, under this court's own doctrine. See *Kittredge* v. *Boyd*, 136 Kan. 691, 18 P. 2d 563 (Kan. 1933). The Kansas Department of Revenue is a semi-autonomous agency of

Kansas which collects, and pays over revenue to respondent State Treasurer, for general revenue purposes for Kansas. It has had numerous Secretaries, Directors of Taxation and other employees during the years at issue. The named respondents are in office now. Mandamus lies against these and the other official respondents, to do a reassessment and implement a refund or credit mechanism. Revenue administration is not always a one-way street. Respondents' official ministerial duties sometimes involve giving citizens their money back. K.S.A. § 79-32,105. *Reich* v. *Collins*, 513 U.S. 106 (1994); *Kittredge* v. *Boyd*, *supra*.

10.A. Petitioners assert in Count I hereof that such purported Kansas single persons' income taxes were collected and retained under 1988 (and later) legislative bills which were partially invalid under the Kansas Constitution. As legislative enactments, they were void for improperly combining (a completely fictitious) police power with revenue raising power, and thus multiplicitous, and lacking a single subject. The singles "surtax" buried therein was consequently null and void, under Kansas law (and federal due process principles). The amounts at issue, levied against each Kansas single taxpayer, were not legal imposts or collections or taxes of the State of Kansas, but have been wrongfully levied, received, retained and used by respondents (without credits, refunds or just compensation). Petitioners further assert via Count II that (i) the collection of such pretended "taxes", (ii) the denial of refunds to date by respondents State Treasurer, Kansas Department of Revenue and Director of Division of Taxation (and by individual Secretaries, Directors, agents, officials, "designees" and others), and (iii) a pattern of public conduct of respondents and others designed to misdirect, obfuscate, and chill the

practical pursuit of refund remedies by single taxpayers, all taken together, deny effective meaningful redress, *en masse*, and thus legislative and administrative due process, to single taxpayers under the Kansas Constitution and XIVth Amendment to the United States Constitution.

10.B. The retention of the amounts at issue, absent practical redress, further amounts to disremediation and an organized "taking" of citizens' remedies and money under the "just compensation" clause of the Vth Amendment to the United States Constitution, as incorporated against the States under the XIVth Amendment. The penalty amounts at issue are citizens' money and they want it (or credits) back.

11.A. Petitioners assert in Counts II and III that the purported Kansas income tax statute of 1988 (and three successors), *assuming it was a properly enacted law*, under which Kansas commenced (and continued through 1997) to collect separate and higher rates on taxable income of all single persons, *on its face*, monetarily burdened and deprived Kansas single taxpayers in their free exercise of their several fundamental civil rights under the Preamble and the First and Fourteenth Amendments to the United States Constitution and under the Kansas Bill of Rights. *The basic substantive fundamental right herein asserted is the personal right to be and remain single during any given period of years, without penalty or surtax.* That is a public question, affecting all citizens of Kansas, which should be clarified by this court. The due process-protected procedural right claimed in this Petition for Writ of Mandamus is for effective judicial redress to single taxpayers *en masse*, and that claim itself presents a larger public question than can be answered by a lecture on administrative procedure.

Appendix D

11.B. On the merits, the statutes purportedly enacted by the legislature contained and directly imposed a new, unnoticed, separate, systematic, discriminatory, and mathematically precise excess rate levy and targeted financial burden, having the effect of a "singles surtax," on petitioners' fundamental right to be and remain single, and thus deprived them of their own property.

11.C. The top rate of the separate singles' "tax" statute was first held unconstitutional on simple "rational basis" equal protection grounds in 1994, by the District Court of Shawnee County, Kansas (Dowd, J.). On interlocutory appeal, solely on the merits, this court reversed, in effect speculating that since marriage is good and should be encouraged, the extra levy on single persons was somehow valid. *Peden* v. *Kansas*, 261 Kan. 239, 930 P. 2d 1 (Kan. 1996), cert. den., 520 U.S. 1229 (1997) ("*Peden*").

11.D. During all that separate litigation, it did not occur to anyone that there is a fundamental personal right to choose to be single,[1] inherent in the liberty interest protected by the XIVth Amendment. In such prior case, this court did not venture beyond the goodness of marriage and low scrutiny "equal protection" doctrine, to scrutinize exactly where or how Kansas could have found any power to surtax petitioners' own fundamental right to be and remain single, via the mathematically explicit surtax rates complained of herein,

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1. If it did occur to anyone, they did an excellent job of keeping the problem off the table, to the detriment of all Kansas single taxpayers and (actually) to Kansas.

under due process principles. Petitioners assert simply that the State of Kansas has no sovereign authority (whether found in concepts of police power, or "classification" doctrine, or revenue raising power, or otherwise) to tax all single people (each and every one of them) into marriage. Count IV hereof, et seq., contains allegations as to misrepresentations of the remedies, "action" (which means "no action") by respondents, the need for state wide equitable jurisdiction in view of multiplicity otherwise, and explains why *Peden* is not *res judicata*.

COUNT I

12.A. Kansas since 1933 has imposed a graduated income tax on individuals, pursuant to the authority of Article 11 § 2 of its Constitution (which permits a tax on individual income, not marital status, and grants no state regulatory power over the absolute individual choice not to marry). Upon the first enactment of a statute (in 1933) imposing such income tax, there was one graduated individual rate schedule, imposing higher rates of tax on progressively higher bracketed amounts of taxable income, until 1988. Kansas has permitted joint returns and income splitting by married couples, after 1948, under a statutory provision that the joint tax on a married couple filing a joint return would be determined by halving the combined (joint) taxable income of the married couple, by then applying the statutory graduated individual rate schedule to such (halved) amount of taxable income, and by doubling the resulting amount. See the pre-1988 versions of K.S.A. § 79-32,110. The pre-1988 joint tax method ameliorated the effect of progressively higher percentage rates of tax on higher

graduated brackets of taxable income, where a married couple was involved, *and thus allowed for the fact that two people lived on the joint income.* Kansas has never, before 1988, targeted a class of individuals for a separate surtax or excise or levy based on marital status.

12.B. In 1988, the draftsmen created a new statutory separate rate regime; the relevant bill simply gave *all* married taxpayers lower separate income tax rates. Single taxpayers got *mathematically explicit higher rates producing cumulative higher taxes on their income at all levels of taxable income.* A completely new system was thereby installed (if the bill were to become a validly enacted law). Congress never did this; neither did any other state.

13. Historically, in the Preambles of bills imposing or changing the individual income tax rate schedule, the prior Kansas draftsmen had stated, and thus had placed the voting legislators and the public on notice, that the relevant bill was ". . . concerning . . . rates of liability of an individual. . . ." Until 1988 this was of course candid and true, since there was historically but one statutory individual rate schedule imposed on graduated brackets of Kansas taxable income. In 1988, the use of such bland words in the Preamble to Ch. 381, 1988 Session Laws (Vol. 2) (with nothing else), to describe the imposition of a completely new dual rate structure for Kansas, which directly imposed a systematically burdensome "singles surtax," was false and misleading, both to the voting members of the Kansas legislature and the public.

Appendix D

14. Historically, where a new or separate tax was involved, the draftsmen would notice such measure in the Preamble of the relevant bill. Thus, even in 1988, draftsmen inserted notice in the Preamble to Ch. 381, 1988 Session Laws (Vol. 2), to the effect that a new corporate alternative minimum tax was imposed by the proposed new statutes contained in the bill. But the new and separate "singles surtax" was buried. It is utterly unnoticed in the Preamble; it is evident only in the statutory mathematics buried in the bill. But the mathematics are explicit.

15. The first relevant bill (described above) came to the Kansas legislature and the public and later the Supreme Court of Kansas with no candid notice or Preamble, no legislative history, no committee reports, and it contained no legislative declarations or findings or imperative directions as to the state of married life (or single persons' lives) in Kansas. It was in form a tax bill. Likewise, there was no other bill in pari materia or any separate committee report indicating a need for police or regulatory action as to the lesser cultural or societal worth, or any relatively greater iniquity or ability to pay, of single persons. *There was not any clear indication of the subject, object or purposes of such bill besides revenue raising*. Nothing in the Preamble would have indicated a social marital welfare program, or a separate levy or penalty on the iniquities of single persons. The legislature seems to have bought the bill, as was, as a tax law. It could only have been voted for or enacted as a tax law. Kansas Constitution, Art. 11, §§4-5. Such is true of all the subsequent bills touching K.S.A. § 79-32,110, down to repeal of the surtax regime in 1998.

Appendix D

16. The Preamble to the foregoing bill (and its successors) as a matter of form (versus substance) appeared to announce and impose income taxes for the general purposes of Kansas government. In fact, as an exercise of taxing power the bill and its successors were surreptitious, misleading, multiplicitious, and thus null and void, under the Kansas Constitution, to the extent that they contained a separate, buried, systematic, new, and unnoticed monetary levy on all Kansas single taxpayers, at any and all levels of Kansas taxable income, under Kansas due process doctrine, and in violation of the "single subject rule" of Art. 2, § 16 of the Kansas Constitution.

17. In the form and style presented, and with no notice, history or findings as to its punitory content, the 1988 bill (and its successors) was not a valid exercise of the police power, the social welfare or benefits power, or any household budget or lifestyle regulatory power of the State of Kansas, and was not a valid statutory enactment under Article 2, § 16 and Article 11, § 2 and § 5 of the Kansas Constitution. The collection (to 1998) and continued retention of the "singles' surtax" amounts by Kansas has further violated both federal and Kansas due process. If some cabal of legislators sought to penalize single taxpayers under state police power, they were log-rolling, and did not even validly enact a bill into law. They improperly combined the subjects. *Panhandle Eastern Pipeline Co.* v. *Fadely*, 183 Kan. 803, 332 P.2d 568 (Kan. 1958); cf., *United States* v. *Butler et al.*, 297 U.S. 1 (1936). To say nothing of the facial constitutionality of any such law.

18. The statute contained in the foregoing bill sought to impose, for the first time, a separate graduated rate structure

and arithmetic regime on single persons, by further dividing the existing K.S.A. § 79-32,110(a) into subclauses, or schedules: "(1)" as to "married" individuals, and "(2)" as to all other individuals. Via this surreptitious draftsmanship, single individuals were (for the first time) separately dealt with, and subjected to uniformly higher rates and cumulative amounts of Kansas "income tax," compared to the rates imposed on the commensurate respective deemed income of married persons. Far from a mere relief device of marital income splitting (as Congress and Kansas had traditionally granted to married couples), Kansas targeted, layed and levied higher rates on *all* single persons. It was thus "taxing" single persons, not Kansas taxable income of all individuals, with mathematical precision and systematic excess. The separate rates were adjusted by the legislature in 1989, 1992 and 1997, but no general relief from the systematic levy was granted to single persons until 1998.

19.A. The following table discloses the additional surtax, or burden, or penalty which is imbedded into K.S.A. § 79-32,110 for all the years at issue (since 1988), on single people. It assumes three individuals: A and B are married; S is single. The table demonstrates that the surtax, or additional burden on S, is systematic, up and down the income brackets. It is assumed that A, B and S all have equal Kansas taxable incomes (though A and B could be splitting and combining differing amounts of their separate incomes). It is assumed that A and B file a joint Kansas income tax return, using the "statutory" joint rates. The burden of the rate excess, or "surtax," on single persons, is depicted in the far right column:

Years	Taxable Income of each (A, B, S)	Maximum Kansas Joint Rate on A+B	Kansas Rate on S	Surtax Burden on S
1988: to	$13750 each	4.05%	4.80%	18.52%
to	17500 each	4.05%	4.80%	18.52%
over	17500 each	5.30% (to 27500)	4.80%	--- *
over	27500 each	5.30%	6.10%	15.09%
1989-91: to	13750 each	3.65%	4.50%	23.29%
to	17500 each	3.65%	4.50%	23.29%
over	17500 each	5.15% (to 27500)	4.50%	--- *
over	27500 each	5.15%	5.95%	15.53%
1992-96:to	15000 each	3.50%	4.40%	25.70%
to	20000 each	6.25% (from 15000)	4.40%	—*
over	20000 each	6.25%	7.50%	20.00%
over	30000 each	6.45%	7.75%	20.16%

* In each of the statutory periods, there is one intermediate internal bracket area in which the levels of taxable income graduation, set in the separate rate schedules, produce a lesser maximum percentage rate on singles, but this area is confined to $10,000 as to singles (from $17,500 to $27,500) for 1988-1991, and for

(Cont'd)

Appendix D

19.A. In all the statutory periods, there is a clear systematic rate discrimination and cumulative burden imposed on single people. The burden is achieved, with mathematical precision, by levying higher rates on the initial levels of Kansas taxable income, and by levying higher rates on the top (or infinite) amounts of Kansas taxable income. The substance of this regime Is a prescriptive "surtax," or separate excise, which is directed at single persons. In 1997, the lowest bracket of single persons was taxed at a rate of 4.1% of the first $20,000 (compared to 3.5% on low bracket married persons up to $30,000 of joint taxable income), a surtax of 17.14%. The surtax for 1997 on top bracket single people was achieved by blandly setting their top rate at 7.75%, compared to 6.45% on top bracket married persons, amounting to a deft penalty, *ad infinitum*, of 20.16% (7.75% ÷ 6.45% = 20.16%).

20. Under the Constitution of Kansas and savings clauses of K.S.A. § 79-3239 and § 79-32,108, the entire "singles surtax" (not just one selected bracket and rate) is invalid and must be held void. Since the legislature of course did intend to impose an income tax on individuals in 1988, and later, as clearly indicated in the relevant Preambles, the valid subclause of the bills which survives (viz., the "joint" rate schedule) should be judicially construed to impose a valid

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(Cont'd)
1992-1996, it is confined to $5,000 (from $15,000 to $20,000). *However, in each of these intermediate areas, the systematic burden, imposed by the prior singles' surtax rates on the initial or lower bracketed income, always results in more cumulative Kansas income tax on S than on A or B.* Then, the surtax resumes as graduated taxable income moves up and out of such intermediate area.

income tax on single individuals. As to single persons, the effective and valid graduated income tax rate schedule would be found by simply halving the graduated bracketed amounts of taxable income (found in the surviving "joint" subclause of the relevant statute) and applying the same percentage rates to such (halved) amounts as are set in the statute for a married couple. The Kansas legislature finally did this (in time for the elections) in 1998; it partially reduced the "burden" in 1997.

21. Single taxpayers of Kansas (and each and every one of them), for all taxable years since 1988, are entitled to reassessment of valid income taxes, and credits or refunds of excess penalty amounts they have paid to Kansas, to the extent such amounts exceed the respective correct graduated income tax, surviving under K.S.A. § 79-32,110, as alleged and explicated in section 20 of this Petition, under federal and Kansas due process. Such credits or refunds are hereinafter sometimes referred to as "excess amounts." Kansas due process mandates this remedy, which is for an ongoing exaction and retention of illegal levies (and failing such refunds or credits results in an unconstitutional "taking"), continuously since 1988, under color of Kansas law. The proper administrative role for the Kansas Department of Revenue is to reassess the relevant income taxes of all such taxpayers for the relevant years and to refund or credit the "excess amounts," *which may be done simply by recomputing the correct taxes from information already filed by the single taxpayers with the original returns*. Absent equitable restitution, Kansas single taxpayers are disremediated and their property is simply "taken" under a void law. That is why this court should take jurisdiction.

Appendix D

COUNT II

22. Petitioners hereby re-allege the foregoing sections of this Petition.

23. The continued collection, retention and use of all the "excess amounts" alleged in Count I hereof, through the agency and coordinated action of all the respondents, amounts to a collective deprivation of citizens' money and a deprivation of legislative and administrative due process to Kansas single taxpayers under the Kansas Bill of Rights, and under the due process clause of the Fourteenth Amendment to the United States Constitution. Such "excess amounts" are not imposed under validly enacted Kansas law, and such amounts belong to the single taxpayers (and each and every one of them) who were induced to pay them in. The continued collection and retention of such "excess amounts" under color of Kansas administrative law (and inapplicable "equal protection" constitutional doctrine), by the various officials named herein, therefore violates the federal civil rights of single Kansas taxpayers under 42 U.S.C. § 1981 *et seq.*, both as to viable remedies and actual monetary restitution. They are being denied access to court, and Kansas has wrongfully kept their money.

24. Kansas law does not provide an administrative agency (or executive branch official) which has judicial competence to adjudicate the validity of the enactment of a bill (or a part thereof) by the Kansas legislature, or the facial constitutionality thereof. But the respondent Department, in violation of its due process duties of candor, truthfulness and fairness, in violation of its duties of public trust, has

countenanced the filing of administrative claims with no special grounds or amounts, while representing that it controls an administrative remedy which in fact does not exist under Kansas law. The respondents have encouraged single Kansas taxpayers to look to them, and to sleep on their fundamental rights and in so doing have violated federal and Kansas procedural due process to Kansas single taxpayers.

25.A. The administrative function of the Department of Revenue, Secretary of Revenue, and the other respondents could only be the simple ministerial processing and payment of refund amounts (or allowance of credits), *after* it is judicially determined that the "excess amounts" have been unconstitutionally levied and retained by Kansas. K.S.A. § 79-32,105(c). Their duties in this case are only ministerial. The relevant information is contained in the income tax returns (form K-40) already on file with the Department.

25.B. There is no difference between a taxpayer who filed claims (viz., petitioner Merritt) and one who did not (viz., petitioner LaFavre). Discrete taxpayer information concerning the actual tax base ("Kansas taxable income"), already on file, has not changed. Indeed it is federal doctrine (binding on Kansas) that an income tax return which shows an overpayment *is* a refund claim. Assuming that ministerial officials are told what the right tax rate is, they are supposed to send the overpayment back to the taxpayers, or credit it. This is not like a case in which administrators may legitimately insist on a claim because they have no information to act upon, otherwise. Cf., *Javor* v. *State Bd. Equalization*, 12 Cal. 3d 790, 117 Cal. Rptr. 305, 527 P.2d 1153 (Cal. 1974).

Appendix D

25.C. To the extent that defendants have arrogated to themselves the role of determining, defending, "adjudicating," and publicizing inaccurate and misleading information about taxpayers' remedies under the circumstances of this case, they have acted ultra vires their authority, in violation of separation of powers doctrine of the Kansas Constitution, Kansas due process, and federal constitutional due process and equal protection doctrine, and in coordinated violation of 42 U.S.C. § 1981 *et seq.* Cf., *Western Union Tel. Co.* v. *Myatt*, 98 F. 335 (D. Kan. 1899) (a remedy before the Kansas Court of Visitation, *which had imposed the penalties, was not due process*). The intended result in substance seems to be a perfected and unilateral "taking" by Kansas. A lecture on administrative law, to several hundred thousand single citizens, is not "just compensation."

26. Respondents have denied personal remedial rights to Kansas single taxpayers, collectively, all in the name of "administration," under an administrative system which will not work in this case. Under equal protection doctrine, there is no rational difference between a single taxpayer who stands on the original information contained in his return (viz., petitioner LaFavre) and one who files a meaningless "claim" which can only regurgitate the identical numerical information already filed in his return, with an administrative official who is incompetent to rule on the statutes themselves (viz., petitioner Merritt). Cf., *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982). The problem is Kansas law, not taxpayer numbers or information, and it is not a lack of citizens' initiative. Taxpayers seek the equitable reassessment

Appendix D

Order in Mandamus prayed for in paragraph 31, *infra*, because it is the only effective remedy in this case, on procedural due process grounds.

COUNT III

27. Petitioners hereby reallege the foregoing sections of this Petition.

28. Petitioners hereby assert and allege that they have a fundamental right under the United States and Kansas Constitutions (and a retained right under the Kansas Bill of Rights, § 20) to be and exist and choose to remain single, during the relevant years, without penalty. That fundamental right is the core of the inherent individual freewill recognized in the "liberty interest" protected under the due process clause of the XIVth Amendment, substantively. They have a fundamental right to marry, or not to marry. Cf., *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (Part II, Warren, C.J.). It is absolute, and a matter of their own inherent freewill, as single individuals. *Blackstone's Commentaries on the Laws of England (1765), Legal Classics Library (Birmingham, 1983), Book One, Ch. I, "The Rights of Persons,"* 119-122.

29. The Kansas statutes themselves, and the actions of the relevant Kansas agencies and departments, and the official respondents herein, to collect, retain, justify, publicly minimize the burden of, and to deny a meaningful remedy for, and to legitimate the systematic singles surtax described herein, amount to the imposition of an unconstitutional, discriminatory and excessive burden, charge, and penalty on single taxpayers, in violation of single taxpayers' fundamental

right to be and remain single under the due process clause of the Fourteenth Amendment to the United States Constitution, and taxpayers' rights of conscience and free exercise under the First Amendment and their "liberty interest" in *being and choosing to be single under the foregoing*. They may be taxed, but not merely for *being* single. Cf., *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943) (preachers may be taxed, but not for preaching). Any such tax is "punitory." *State* v. *Gowdy*, 62 Mont. 119, 203 Pac. 1115 (Mont. 1922) (invalid head tax on bachelors; case undiscovered or suppressed in *Peden*).

30. The burden of the purported tax heretofore alleged, which amounts to a surtax on the income of single persons at all levels and in all instances, is systematic and targeted, as depicted in paragraph 19 hereof. Such surtax is not merely incidental to random cases; it is structured so that it can only impose higher tax, up and down the income scale, on all single persons. It is not a sometime effect of legislative income bracket graduation (which classifies income), and is thus unlike any income tax imposed by Congress, which has never targeted all married or all single people. That is why I.R.C. § 1, 26 U.S.C. § 1, is constitutional, and these purported Kansas "laws" are not. Cf., *Mapes* v. *United States*, 576 F.2d 896, 901 (Ct. Cl. 1978), cert. den., 439 U.S. 1046 (1978) (so-called "marriage penalty" is not imposed on all marriage, and is not "for marrying").

31. Petitioners request that the singles surtax, under which Kansas has collected the "excess amounts" alleged in paragraphs 20 and 21 hereof, since 1988, be declared unconstitutional on its face, and that this court enter its Order

for a reassessment of the correct Kansas income tax, by respondents, for 1988-1997, under the supervision of a Master or Referee to be appointed by this court within a period to be set by the court. Petitioners also seek attorneys fees and costs for the prosecution of this action, under equitable doctrine of *quantum meruit*, common fund doctrine of unjust enrichment, K.S.A. § 79-3268 (which should apply where respondents have always known full well that there *is* no viable administrative remedy for the masses), and 42 U.S.C. § 1988.

COUNT IV

32. In the prior Kansas state court action, styled *Peden* v. *Kansas*, 930 P.2d 1, 261 Kan. 239 (1996)("*Peden*"), K.S.A. § 79-32,110 was challenged solely on "rational basis" equal protection grounds. Those plaintiffs did not raise any fundamental right or liberty interest (under due process principles) involved in being and remaining single in this court (see Count III hereof). Neither did those plaintiffs raise the Kansas constitutional or federal due process or "takings" issue surrounding the invalid "enactment" of the relevant legislation and the retention of the illegal amounts (Count I hereof). The related disremediation and disinformation matters alleged in Count II hereof under the Civil Rights Acts arose during the pendency of that action, and have continued to the present.

33. The Supreme Court of the United States denied a petition for certiorari in *Peden*, and respondents thereupon publicly represented that *Peden* is therefore dispositive of all the rights of all Kansas single taxpayers. That notion is

false. *South Central Bell Tel. Co.* v. *Alabama*, 526 U.S. 160 (1999); *Richards* v. *Jefferson County*, 517 U.S. 793 (1996). The Governor of Kansas represented in the press that such case should be accorded authority, as justified by "state power," and thereby further induced a belief that Kansas single taxpayers constitutional claims on the merits and reassessment rights were finally determined thereby. Such impression is false. There is no state power to license or tax or penalize single people into marriage. They have a fundamental right to be and remain single.

34. Respondents have wrongly, falsely, deliberately and separately represented to administrative refund claimants that their substantive fundamental rights claim and procedural rights to redress were exclusively bound up in the result of *Peden*, and were thereby extinguished.

35.A. No publication or notice as to the correct tax rates (which the plaintiffs and the District Court in *Peden* didn't bother with), refund amounts, the income brackets of the asserted "class," or due process-mandated opt out rights was ever published by the court system of Kansas, or at its direction, or by the plaintiffs, during the foregoing case. The District Court of Shawnee County failed to address the key question of what the right rates actually were, and held that only the top bracket "disparity" was irrational.[2]

35.B. The surface rational basis "equal protection" issue therein decided is not probative much less controlling over the fundamental rights and due process penalty matters raised

2. So what good could a "claim" do? What was the "rational" refund?

herein. Kansas cannot tax the fundamental right to be single, just because it can "classify" single people for income graduation purposes, nor can it impose an annual license or levy, for the right to remain single, on its unmarried citizens.

36. It would violate federal due process for this court to accord any judicially preclusive or precedential significance to *Peden* as to the parties, fundamental rights claims, issues, and penalties and burdens raised herein, which are completely different. *Peden*, as a mere matter of "rational basis" speculation, is further infirm in that those plaintiffs and this court ignored census data as to men and women in Kansas. There are too many Kansas single women to speculate on taxing or licensing them into marriage, or for any sane legislature to even contemplate such an attempt, even if it had police power in the premises. According to the U.S. Census for 1990, there were 3.28 Kansas single women at ages 55 and up for each such single man.

37. Petitioner Merritt (in an excess of caution) filed an opt-out with the District Court of Shawnee County, Kansas, where the prior case originated, on March 7, 1997, exercising his federal due process right to pursue his own claims. In this opt-out, he raised notice and opt-out issues, *inter alia*, which would apply to all single taxpayers. There was no action by that court, which finally simply dismissed Mr. Peden and Ms. Smith after the reversal on the merits in this court. There is not any globally preclusive decree, much less any of the due process-mandated judicial steps or conditions which could support any such purported decree, presented by *Peden*.

Appendix D

38. All single Kansas taxpayers, who have been induced to sleep on their rights, have not been given notice, or the opportunity to opt out of such prior state court action, in any clear or explicit manner, at the instance of any participant. It would deny federal due process to deny them a hearing in this suit. There is no group-wide, or state-wide remedy at present, much less one which is clear, certain, speedy or viable, but in this court on mandamus.

39. Petitioner Merritt requested of respondents waivers of any applicable *period of limitation for filing suit* (having found nothing in Chapter 79), and supplemented his original refund claims, on March 19, 1997, having first filed such original administrative refund claims for 1988-1995 in April, of 1996. There has been no response. Respondents never took cognizance of, or action on, petitioner Merritt's original refund claims other than to (i) deny them, (ii) represent that their "judgment" would "stand," and, (iii) send him superfluous information and misleading representations about *Peden*, and to (iv) hold any hearing "in abeyance" and purport to "bind" him against any other action. As though they had judicial competence or *in personam* judicial power. None of the foregoing amounts to responsible "action" within the meaning of K.S.A. § 79-3230(d).

40. Any purported "action" by respondents would be (and heretofore has been) utterly meaningless, since respondents have no constitutional adjudicatory or remedial authority in a case where the facial validity of a Kansas tax statute is challenged. As to 1996, taxpayer Merritt presented arguments in an intra-Departmental hearing, against assessment of the "surtax" for that year, and heard from the

Department of Revenue that "there is no fundamental right to be single..." in a letter dated November 6, 1998. *At that point an accountant or Joe Blow pro se taxpayer would just quit. But that's the point; Kansas keeps the money.*

41. Kansas has provided a "suit" under K.S.A. § 79-3230(d), as indeed it must, since it enforces and collects anticipatory withholding and estimated income tax amounts regularly during each year and has due process and Vth Amendment obligations as to refunds and as to viable, simple and effective remedies for taxpayers who might overpay as a result of constitutional violations by Kansas. That statute does not specify one defendant or any one court. Nor would it have to. *Burrill* v. *Locomobile Co.*, 258 U.S. 34 (1922); *The City of Chicago* v. *Dows*, 78 U.S. (11 Wall.) 108, 20 L. Ed. 65 (1871). The statute bespeaks a simple "pay now, litigate later" rule, and recognizes that circumstances differ. The judicial remedy is for citizens, not for bureaucrats.

41.B. A "suit" does not mean "no suit." If that is Kansas judicial doctrine, then in fact it works an abrogation of § 79-3230(d), and deprives petitioners and all single taxpayers of any meaningful remedy, contrary to federal due process principles. *Reich* v. *Collins*, 513 U.S. 106 (1994); *Kittredge* v. *Boyd*, 136 Kan. 691, 18 P. 2d 563 (Kan. 1933). Cf., *Ogden City* v. *Armstrong*, 168 U.S. 224 (1897), 237-241, which discusses multiplicity, and is also instructive as to the instant problem (at 240-241):

> Where the tax was wholly void and illegal, as in this case, the statute and its remedies for error and irregularities have no application.

Appendix D

41.C. As to single persons employed by Kansas employers, there is no pre-deprivation remedy as to the "excess amounts" collected and retained by employers and defendants, because of an automatic anticipatory wage withholding tax system maintained by Kansas. As to self-employed persons, the result is the same via required estimated payments.

42. *Peden* is not res judicata as to the Kansas enactment and due process claim (Count I), civil rights claims, fundamental rights claims, remedial due process and Vth Amendment claims and remedies prayed for in this case. It ignored the paramount public citizens' claim that Kansas single taxpayers have a fundamental right to be and remain single which was constitutionally burdened by the "tax" complained of herein. The court in *Peden* never acquired binding preclusive *in personam* jurisdiction over all Kansas single taxpayers.

43.A. These separate petitioners filed a class action complaint in federal court on April 15, 1999, asking the United States District Court for the District of Kansas to take jurisdiction of their fundamental rights claims under the Civil Rights Acts. That court dismissed on pre-answer motion (by respondents) on February 18, 2000; the sole reason was that the district court held that it lacked subject matter jurisdiction on "federalism" grounds, under the XIth Amendment to the United States Constitution. The United States Court of Appeals for the 10th Circuit affirmed on April 3, 2001. A petition for certiorari to the Supreme Court of the United States was denied on January 7, 2002. Federal district court jurisdiction to hear

these claims and order restitution or another remedy in equity (such as credits) therefore does not exist. Nonetheless, this court has original jurisdiction and federal due process requires Kansas courts to provide meaningful retrospective relief to *all single taxpayers*, which the current Kansas administrative system, limited by its judiciary to case by case "review" of individual facts and circumstances, does not afford.

43.B. Again, *the problem in this case is the purported state law which levies the money, not individual circumstances or specific action by the citizens.* Respondents already know which taxpayers filed forms K-40 and who said they were single. Respondents already know how much money was paid in. The administrative system is not even adequately funded in an amount sufficient to cover refunds. $4,000,000 was never adequate. Respondents are however subject to orders of this court under K.S.A. § 60-801, and under K.S.A. § 79-32,105. Then they can administer the reassessment all they want, until they give the money back, dollar for penalty dollar.

ALLEGATIONS AS TO MULTIPLICITY

44. All the scores of thousands of single persons who have paid income taxes to Kansas for the taxable years 1988-1997 suffer alike from the same discriminatory rate schedules, whether they had $500 or $5,000,000 of Kansas taxable income in any given year. Mathematical differences in the amounts of purported "tax" paid are immaterial, as are numerical differences in the Kansas taxable income

reported in the returns. The statutory rate schedule applied to all single persons is void for each and every year. Refund or forward credit amounts can be handled during the reassessment after this case is resolved on the merits. Joinder of all single taxpayers is impracticable.

45. Named petitioners herein have claims which are typical of the class. Merritt pursued purported administrative remedies as did many other single taxpayers (which was utterly pointless); petitioner single taxpayers believe that many other taxpayers knew nothing about the matter and did nothing. Other practitioners advised their clients to await action by this court before doing anything themselves, during the pendency of *Peden*. The result is the same. The surtax is invalid as to all single taxpayers, and certainly respondents' "administration" and practical disremediation operates on the entire class. All single Kansas taxpayers continue to suffer a due process deprivation from the "singles' surtax," as long as forward credits or refunds are denied.

46. Petitioners Merritt and LaFavre have claims typical of the class, are therefore entitled to bring this suit, and will fairly and adequately represent all Kansas single taxpayers. Equitable relief in mandamus from this court is the only extant judicial relief under extant Kansas doctrine. The "public questions" are simple enough: (1) is there a fundamental right of United States (and Kansas) citizens to be and remain single which may not be systematically penalized by a state?, and (2) if the law *is* void on its face, can Kansas really insist on a rote (and ridiculous) administrative system here, person by person, before

citizens may get statewide credits, refunds, restitution or "just compensation?" There was never enough money to fund the administrative refund system. See sections 1 and 9, *supra*.

47. All Kansas single taxpayers cannot possibly (economically or practically) prosecute separate constitutional jurisprudential claims on the merits, but present Kansas doctrine seems to require just this, a multiplicity of administrative claims and review proceedings. All such citizens who were single have an interest in the fundamental rights claims and other matters raised herein. There are no special difficulties with this case in securing the jurisprudential adjudication sought herein.

48.A. Petitioner Merritt has resided at 8037 Mohawk Drive, Apartment 20l, Prairie Village, Kansas 66208 since 1984. He has filed returns with Kansas as a single taxpayer and paid the purported taxes shown to be due for 1988-1995, and filed refund claims with respondents in April of 1996. After such claims were denied, taxpayer requested a hearing, and was greeted by a communication from respondent Department dated September 25, 1996 in which it is represented that all hearings are "in abeyance" pending *Peden*, which would control the outcome of all claims. Afterwards, Merritt supplemented his claims (March 19, 1997) and requested waivers of any statute of limitations on filing suit with respect to his claims (same date), having found no statute of limitations in the Kansas Income Tax Act on filing suit. *There was no response or other action of any kind by any respondent as to 1988-1995.* Petitioner believes that the fate of his administrative refund claims, 1988-1995,

is typical of those single taxpayers who even heard of the matter and filed anything anywhere. The net result could only be "no action."

48.B. Petitioner has sought to exercise his pre-deprivation remedies as to 1996, but under distraint paid an invalid assessment on March 24, 1999 and filed another (1996) refund claim thereafter. That administrative claim is still pending before respondent Lochow, who in fact has no authority in this constitutional matter. As to 1997, he has paid the "correct" tax to Kansas. Other single taxpayers will have pursued various approaches to the problem, all with the same result. There has been no adjudication on the question of Kansas' systematic surtax on the fundamental right to be and remain single; Kansas keeps the money.

49. Petitioner LaFavre has been a resident of Kansas and single since 1994. She has filed Kansas income tax returns as a single person, 1994-1997 (sub nom. "Howerter"). She has pursued no administrative claims, on the initially plausible advice during the pendency of *Peden* that a group wide, class wide, or state wide refund remedy, based on a reassessment or other legislative claims procedure, would be available after the relevant statutes were invalidated, as happened with the military retirees' case. See K.S.A. § 79-32,193. She resides at 6800 Fontana, Prairie Village, Kansas 66208. Her claims are typical however, of a larger class, who did not, and could not, have taken meaningful separate personal action to vindicate their constitutional rights, because of the individual expense involved in pursuing a meaningless claim through meaningless administrative rituals up to judicial review and

refunds. Other tax professionals gave the same advice for the same practical reasons. *The point is that judicial action is required, and individual cost shuts down individual access to court.* Cf., *Boddie* v. *Connecticut*, 401 U.S. 371 (1971).

REASSESSMENT ORDER

50. Petitioners request an Order in the nature of Mandamus that valid Kansas income taxes be reassessed by respondents, as to all single persons who paid such taxes, 1988-1997, on the basis of the "saved" and valid Kansas income tax rates suggested in section 20 hereof, that respondent State Treasurer cooperate therein, and that evidence of credits or actual refunds of the excess amounts now retained by respondent State Treasurer be issued to such single persons, again under the supervision of the Master or Referee requested in paragraph 31 hereof, unless a superior legislative state remedy is enacted.

WHEREFORE, petitioners pray for an order to respondents to show cause why the Writ should not be issued and why an Order for Reassessment should not be entered, and for this court to set a briefing schedule thereon, and thereafter for the Writ of Mandamus, and for the Order for Reassessment requested above, or such other equitable relief as shall appear fair and just.

Appendix D

Respectfully submitted,

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APPENDIX E — MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS FILED IN THE SUPREME COURT OF THE STATE OF KANSAS DATED FEBRUARY 6, 2002

No. _____

IN THE SUPREME COURT OF THE STATE OF KANSAS

CAROLYN A. ("HOWERTER") La FAVRE, and
JAMES SCOTT MERRITT, JR., et al.

v.

KANSAS DEPARTMENT OF REVENUE, et al.

Memorandum of Points and Authorities in
Support of Petition for Writ of Mandamus

Introduction

This court's plenary power to issue a writ of mandamus to the relevant named state officials is well established in Kansas; petitioners invoke that power here, further invoking their own constitutional rights to procedural due process and ultimate meaningful redress. *They raise the substantive questions of whether or not Kansas recognizes a fundamental right inherent in citizens to be and remain single, and whether the mathematically explicit surtax imposed on all single persons during 1988-1997 was unconstitutional on its face, in that it systematically penalized such fundamental right as a matter of substantive due process.* Low scrutiny equal protection doctrine does not serve as a source of inherent government police power or revenue raising power to license

single people, to surtax them into marriage, or to impose a levy or charge on the exercise (according to their own choice) of their fundamental inherent right to be or remain single. That is the matter which was not addressed in *Peden* v. *Kansas*, 261 Kan. 239, 930 P. 2d 1 (Kan. 1996), cert. den., 520 U.S. 1229 (1997) ("*Peden*"). *Peden* decided the wrong issue.

It is no big deal to classify single persons differently from married persons, for purposes of distributing welfare benefits or entitlements or setting income brackets or allowing deductions. However, Kansas has no power to impose a monetary surtax or license or levy on all single persons (just because they are single) until they marry. *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943); *Bayside Enterprises, Inc.*, v. *Carson, et al.*, 450 F. Supp. 696, 704 (M.D. Fla. 1978) (". . . a state may not impose a charge for the enjoyment of a right granted by the federal constitution").

Procedurally, as a matter of due process, this court can decide the case, and order the right remedy, which is to reassess the right income taxes on the basis of "saved" constitutional rates, for affected citizens. Cf., *United States* v. *Osage County (Okla.)*, 251 U.S. 128 (1919) ("reappraisement"). The issues here are of great public interest to any single person in Kansas, on the merits and procedurally. This is not a factual case. This is not a welfare or backpay or entitlements eligibility or contractual damages case; Kansas put monetary levies on all the single citizens' own property, based on void statutory rates.

Appendix E

The question of the basic fundamental right to be and remain single is *common to all natural persons who filed returns and paid the singles' surtax complained of herein, 1988-1997.* Petitioners assert that the statutory surtax was unconstitutional on its face, in that it penalized that right, inherent in the individual "liberty interest" protected by Kansas and federal due process. In 1990, there seem to have been 244,866 males in Kansas (over the age of 15) who had never married. There appear to have been 104,011 single males who were separated, widowed, or divorced. As to females, there seem to have been 189,997 single females in Kansas (over the age of 15) who had never married. There appear to have been 230,471 single females who were separated, widowed, or divorced. The foregoing raw numbers are from the 1990 U.S. Census.

Significant numbers of these single persons no doubt were living on something besides parental largess or charity, and will have filed income tax returns (K-40) and paid income taxes, as single persons, to Kansas during all the years at issue. The respondents will know how many returns were filed by single persons. The public question is whether they had a fundamental right to be and remain single which was explicitly surtaxed and penalized by Kansas' unique regime.

A second public (and constitutional) question is simply whether existing Kansas administrative doctrine and procedure is sufficient to actually provide meaningful retrospective refund relief, or forward looking credit relief, to the hundreds of thousands of single persons involved. Actually, neither the respondent Kansas Department of Revenue, nor the Kansas Board of Tax Appeals, could ever

have physically handled several hundred thousand constitutional claims as separate adversarial matters, or "reviewed" such. *A computer could reassess the right tax from the original citizens' information already filed in their returns (K-40), once this court tells it (and the respondents) what the right tax rates were.* Thereupon, the right monetary refunds (or credits) will be plain as day.

Petitioners bring this petition in this tribunal because, as yet in fact, *there is nothing for the respondents to administer, where the controversy involves the constitutionality of a statewide levying statute itself.* Due process (Kansas and federal) mandates that there be practical access to a judicial tribunal with authority (i) to declare the law void, and (ii) to order redress. Respondents have no such authority; there was never enough administratively controlled money to pay all the potential claims anyway. K.S.A. § 79-32,105(b); Petition, section 1. Respondents' ministerial duty in fact is simply to follow the orders of this court once the statute is struck. K.S.A. § 79-32,105(c).

I.

As alleged in the petition, and explicated in the introduction, the existence of the fundamental right to be and remain single, protected by the liberty interest found in the due process clause of the XIVth Amendment, *is a public question organic to all the rights of citizenship* exercised every day by single persons in Kansas. That presents a classic case for mandamus. *Stephens* v. *Van Arsdale*, 227 Kan. 676, 608 P.2d 972 (Kan. 1980).

Appendix E

II.

There are no issues of fact to be resolved here. The Kansas statutes were either unconstitutional on their face as to all single taxpayers, or they were not. Resolution here will be expeditious. Cf., *Kansas City Star Co.* v. *Fossey*, 230 Kan. 240, 630 P.2d 1176 (Kan. 1981). As to reassessment, the numerical facts are already declared, reported, and self-assessed in the income tax returns; they do not change. If the filed returns reflect an overassessment of tax, the simple ministerial duty of respondents is to see to it that the citizens get their money back. If the tax is in excess of the amount legally due, the citizen has a due process substantive right to get it back. K.S.A. § 79-32,105(c); *Reich* v. *Collins*, 513 U.S. 106 (1994). Thus, again, any dumb computer can apply the correct or "saved" tax rates to the Kansas taxable income already reported, and can determine the amount paid "in excess of the amount legally due." The action required here is all ministerial. Except that Kansas single taxpayers require a judicial tribunal to order respondents to do their duty.

III.

It is a common public question as to *whether the statutory surtax regime was constitutional*. Such is the elemental case for a writ of mandamus and a judicial decision on the elemental question. *State ex rel. Stephan* v. *Martin*, 230 Kan. 747, 641 P.2d 1011 (Kan. 1982).

Manhattan Buildings, Inc. v. *Hurley*, 231 Kan. 20, 643 P.2d 87 (Kan. 1982) was a similar case, in that the

question was constitutional and the court's answer would affect various leases with Kansas government all over the state. The plaintiffs raised the federal contracts clause against the relevant Kansas statute. Further, this court clearly held that parties who were burdened by the law in question had a perfect right to bring their constitutional claims in mandamus.

IV.

This case is also a classic for mandamus under K.S.A. § 60-801 because the respondents are officials whose discretionary powers to void a Kansas statute on constitutional grounds are zero. *Their ministerial official duties are simply to make restitution after this court enters the appropriate order.* Again, the named petitioners have both been penalized by the statutes and have an interest common to all Kansas single taxpayers. Respondents have the official duty to execute the remedy when this court orders it. *Mobil Oil Corp.* v. *McHenry*, 200 Kan. 211, 436 P.2d 982 (Kan. 1968).

V.

Elemental federal due process requires a simple and effective remedy for taxpayers who are burdened by unconstitutional state levies. If there is a statutory refund process which will work, then mandamus may be denied. *General Oil Co.* v. *Crain*, 209 U.S. 211 (1908); *Tennessee* v. *Sneed*, 96 U.S. 69 (1877). *Otherwise, mandamus may not be denied. Kittredge* v. *Boyd*, 136 Kan. 691, 18 P. 2d 563 (Kan. 1933). The important due process mandate is that simple and effective relief must be granted, and that a

systematic state denial of refunds (or other "bait and switch" tactics) is itself a separate procedural due process violation. *Reich* v. *Collins*, 513 U.S. 106 (1994) (and cases cited); *South Central Bell Tel. Co.* v. *Alabama*, 526 U.S. 160 (1999) (spurious *res judicata*); *Richards* v. *Jefferson County*, 517 U.S. 793 (1996) (spurious disremediation via spurious *res judicata*); *McKesson* v. *Division of Alcoholic Beverages*, 496 U.S. 18, 51 (1990), n. 35 (spurious attempt to retain money when tax was unconstitutional).

This court in 1933 originally understood due process and the need for mandamus, as a matter of vindicating the rights of aggrieved taxpayers. *Kittredge* v. *Boyd*, 136 Kan. 691, 18 P. 2d 563 (Kan. 1933). There, those taxpayers had no other remedy and the court supplied it, by exercising judicial power to issue its ancient prerogative writ. The court lectured the official respondents on bureaucratic gamesmanship and stated that officials had no right to keep an unconstitutional tax. *Further, any legislative attempts to appropriate constitutionally tainted money would be void.* Constitutionally tainted money disposed of by respondent Shallenburger is *still* the single taxpayers' money. Respondents may not stand on administrative procedure where the levy itself is void. *Ogden City* v. *Armstrong*, 168 U.S. 224 (1897). See also, *Atchison, Topeka & S. F. Ry. Co.* v. *O'Connor*, 223 U.S. 280 (1912) (trust theory as in *Kittredge*; constitutional claim of taxpayer was "paramount" to that of the state); *United States* v. *American Tobacco Co.*, 166 U.S. 468 (1897) ("claims" procedure wouldn't work; U.S. suffered "no loss"); *DeLima* v. *Bidwell*, 182 U.S. 1, 180 (1901) (taxpayer not limited to claims procedure; constitutional question as to the levy itself, involving U.S.

sovereignty over Puerto Rico); *Cyprus Amax Coal Co.* v. *United States*, Georgetown.edu/Fed-Ct/Circuit/fed/op./99-5060(Fed. Cir. 1999), cert. den., _ U.S. _ (6-4-2001) (remedy for void coal export tax is self-executing, regardless of alternative administrative claims route).

Conclusion

This court should enter an order to show cause, establish a briefing schedule, and ultimately issue the Writ of Mandamus, all to decide the constitutional questions raised and to provide an effective remedy for the single citizens of Kansas. Even assuming that hundreds of thousands of citizens had filed their little "claims" and fatuously sought bureaucratic review, there was never enough money under control of respondents (or statutorily earmarked for refunds) to satisfy all the claims. See K.S.A. § 79-32,105(b); Petition, sections 1, 9, 43, 46. Equity provides an answer, and rote doctrines of administrative law or other posturings about fictitious and ineffective remedies do not. *County of Lincoln* v. *Luning*, 133 U.S. 529 (1890); *Beadles* v. *Smyser*, 209 U.S. 393 (1908); *Stewart Dry Goods Co.* v. *Lewis (I)*, 287 U.S. 9 (1932).

Appendix E

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APPENDIX F — MOTION FOR REHEARING AND TO VACATE DISMISSAL, AND FOR PRE-HEARING CONFERENCE FILED IN THE SUPREME COURT OF THE STATE OF KANSAS DATED APRIL 8, 2002

No. 02-88431-S

IN THE SUPREME COURT OF
THE STATE OF KANSAS

CAROLYN A. ("HOWERTER") La FAVRE, and JAMES SCOTT MERRITT, JR., on behalf of themselves and all single Kansas income tax payers,

Petitioners,

v.

KANSAS DEPARTMENT OF REVENUE,
a Kansas Agency,
TIM SHALLENBURGER, as State
Treasurer of Kansas,

STEPHEN S. RICHARDS, Secretary of Revenue
of the Kansas Department of Revenue, et al.,

Respondents.

MOTION FOR REHEARING AND TO VACATE DISMISSAL, AND FOR PRE-HEARING CONFERENCE

On February 6, 2002, petitioners filed their Petition for Writ of Mandamus and Order for Reassessment ("Petition") with a supplemental Memorandum of Points and Authorities ("Memorandum"). Respondents filed no reply.

Appendix F

At least until the early 1990's, this court regularly exercised its original mandamus jurisdiction in cases raising public questions, the constitutionality of statutes, matters of fundamental rights, and in cases of state-wide importance where there were no significant factual issues. Memorandum, pp. 2-9. Yet, on March 20, 2002, the Petition was denied, without opinion (copy attached).

Pursuant to this court's Rule No. 7.06, Rule No. 9.01(e), Rule No. 1.04 and Rule No. 5.01, petitioners hereby move the court (i) to vacate the denial of March 20, 2002, and (ii) to schedule a pre-hearing conference before Chief Justice Kay McFarland. Otherwise, a grave injustice, amounting to procedural and remedial deprivation, will be done by this court to the mass of single citizens of Kansas. Cf., *Gelpcke* v. *City of Dubuque*, 68 U.S. (1 Wall.) 175, 206-7, 17 L.Ed. 520, 526 (1864). Contrary to federal due process. *Reich* v. *Collins*, 513 U.S. 106 (1994); *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930). Petitioners entreat this court not to ignore the due process jurisprudence of the United States Supreme Court in this area. Cf., Scalia, J., in *Kansas* v. *Crane*, _ U.S. _, U.S. S.Ct. Dkt. No. 00-957 (1-22-02). This court should direct the respondents to show cause, and schedule a pre-hearing conference with the Chief Justice, because important public questions are presented which deserve the court's plenary review.

Petitioners further entreat the court not to ignore the due process rights of hundreds of thousands of lower and middle income single taxpayers of Kansas, single mothers, bachelors, widows and widowers, who were all invalidly surtaxed for 10 years, and could not have pursued individual

administrative remedies. Any more than they all could have gotten married. They all had a fundamental right to be and remain single, which was invalidly surtaxed, and this court has not addressed that matter, much less their remedial plight under the present Kansas system.

A single person earning an average of $10,000 per year in Kansas taxable income was surtaxed $840 during 1988-97 (without interest). Such persons, and those surtaxed much more, could not have carried through with individual, tedious, administrative proceedings, leading only to bureaucratic review, and then appealed and litigated separate constitutional refund claims up to this court, severally. The Kansas wage withholding system precludes any notion of a pre-deprivation remedy for wage-earners.

* * *

Petitioners seek to void the assessments of purported Kansas income tax levied on all single persons, 1988-97, imposed by K.S.A. § 79-32,110, on the substantive due process grounds that such statutes systematically penalized their absolute fundamental right to choose not to marry, or "to be and remain single." That claim is public and common to all the single citizens of Kansas who received income during the years at issue, and affects the balances of all their taxpayer accounts with respondent Kansas Department of Revenue as of today. Petitioners further seek a remedial Order for respondents to redetermine (or reassess) valid "saved" Kansas income tax on single persons, which will mathematically produce credits or refunds of the excess (void) penalties. Petition, sections 19 and 20. If this court

voids the penalty element of the rates built into the challenged statutes, it is the plain statutory duty of respondents to square up the accounts. K.S.A. § 79-32,105(c). The necessary taxpayer information is already filed with petitioners' returns. All of it. The question is the validity of the statutory rates.

This court's inherent plenary jurisdiction over the respondent Department of Revenue and other state officials (and petitioners' federal constitutional claims) is invoked under Article 3, § 3 of the Kansas Constitution, under K.S.A. § 60-801, and under the due process clause of the XIVth Amendment. Petitioners sought the remedial writ of mandamus here, because this court has prerogative power to strike the penalty element of the levies on public constitutional grounds and to order a ministerial reassessment by respondents, pursuant to K.S.A. § 79-32,105(c), on behalf of *all* afflicted single taxpayers. Cf., *Duke* v. *Turner*, 204 U.S. 623, 632 (1907); *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 522, 623-24, 9 L.Ed. 1181, 1220 (1838) (mandamus to correct erroneous postal accounts); *Felten Truck Line* v. *Bd. of Tax Appeals*, 183 Kan. 287, 327 P.2d 836 (Kan. 1958) (where the statute itself was challenged); *Kittredge* v. *Boyd*, 136 Kan. 691, 18 P. 2d 563 (Kan. 1933) (mandamus to Treasurer and other officials to return unconstitutionally levied tax; attempted legislative appropriation of unconstitutional tax money would be void).

* * *

Ordinarily, the Kansas Supreme Court could transfer this matter to a district court having jurisdiction, Rule 9.01(a); *but there is no Kansas lower court which can grant*

meaningful and effective reassessment or class relief in this case, on a group-wide or state-wide basis, which will remediate all the penalized Kansas single taxpayers. *Zarda* v. *Kansas*, 250 Kan. 364, 826 P.2d 1365 (Kan. 1992); *Dean* v. *Kansas*, 250 Kan. 417, 826 P. 2d 1373 (Kan. 1992); *Farmers Banshares of Abilene* v. *Graves*, 250 Kan. 520, 826 P.2d 1363 (Kan. 1992). It was this court which denied group-wide relief in the district courts in those cases. Kansas kept the money. In *Peden* v. *Kansas* , 261 Kan. 239, 930 P. 2d 1 (Kan. 1996), cert. den., 520 U.S. 1229 (1997), the same problem was there, but the court dealt only with low scrutiny equal protection, and reversed the district court on the merits. It did not deal with penalties on the fundamental right to choose to be single, and did not address the remedial plight of all the single taxpayers.

Thus, petitioners pray for mandamus and stand on their remedial due process rights here. *Brinkerhoff-Faris Trust and Savings Co.* v. *Hill*, 281 U.S. 673 (1930) (early "bait and switch" case involving defensive state arbitrage between mandamus and fictive administrative remedies). See Woolhandler, Ann, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 Yale L.J. 77 (1997), 113 et seq. (mandamus was original means of enforcing citizens' rights vs. recalcitrant officials). No Kansas statute can repeal or abrogate this court's original jurisdiction under Article 3, § 3 of the Kansas Constitution, or this court's duties to its own citizens under the XIVth Amendment.

The present Kansas administrative refund regime simply does not contemplate the eventuality that a mass taxing statute would be held unconstitutional on its face, and

therefore does not provide a simple and effective means for mass redress, as a matter of procedural due process. A writ of mandamus *is the means* of mass redress, here. Other state courts have provided redress on a mass basis to aggrieved taxpayers, and thus accorded basic due process, in cases of systematic official illegality practiced on the masses. *Javor* v. *State Bd. Equalization*, 12 Cal. 3d 790, 117 Cal. Rptr. 305, 527 P.2d 1153 (Cal. 1974); *Santa Barbara Optical Co.* v. *State Bd. Equalization*, 47 Cal. App. 3d 244, 120 Cal. Rptr. 609 (Cal. App. 1975); *Ware* v. *Idaho State Tax Com.*, 98 Id. 477, 567 P.2d 423 (Id. 1977). Kansas cannot collect mass levies on all the single citizens wholesale, and then insist on retail claims administration, where the statutory levies themselves are challenged as void, on fundamental rights grounds.

Petitioners estimate that 300-400,000 Kansas single persons filed income tax returns (K-40) for 1998-97, and have a financial interest in the outcome of this matter. They could never realistically be expected to pursue separate administrative refund claims on the common fundamental rights question; they could never each afford it. Cf., *Boddie* v. *Connecticut*, 401 U.S. 371 (1971). But that is precisely the financial reality upon which respondent officials traffic. That way, they keep the money, tainted or not. Yet they have no juridical competency to void a statute which is unconstitutional on its face. *Their clear ministerial duty is to credit or refund the taxpayers when this court strikes the penalties.* K.S.A. § 79-32,105(c). It is not the filed returns, or the individual taxpayers (or any questions about their taxable income), which are the problem; it is the purported mass levying statutes (1988-97). A filed income tax return which produces an overpayment *is* a refund claim.

Appendix F

Administratively, respondents could never have heard hundreds of thousands of separate (yet identical) single taxpayers' refund claims. Petitioner Merritt was told as much during a telephone conversation with an official of the Kansas Department of Revenue in 1998. Neither could the Kansas Board of Tax Appeals. No administrative refund claim could have any meaningful effect, without a court's prior holding as to the validity of the statute, and a judicial holding as to valid "saved" income tax rates. K.S.A. § 79-3239; Petition, section 20.

Further, the assets segregated by K.S.A. § 79-32,105(b) (providing only $4 million for refunds) were inadequate to support refunds to all single taxpayers at all relevant times. Petition, sections 1, 9, 43, 46. See *Burrill* v. *Locomobile Co.*, 258 U.S. 34 (1922) (remedy must be backed by the resources of the state).

Plaintiff multiplicity, and a public question involving fundamental rights and the constitutionality of a state law, are both classic reasons for the court to hear the petition. Respondents' duty is to follow this court's orders, not obfuscate the citizens' remedial due process rights. Memorandum, pp. 2-9; *Ogden City* v. *Armstrong*, 168 U.S. 224 (1897), 237-241 ("Where the tax was wholly void and illegal, as in this case, the statute and its remedies for error and irregularities have no application."); *Shelton* v. *Platt*, 139 U.S. 591 (1891) (multiplicity); *Board of Liquidation* v. *McComb*, 92 U.S. (2 Otto) 531, 541, 23 L.Ed. 623, 628 (1876) ("any person" may have mandamus to compel ministerial action; officials may not rely on unconstitutional law, which will be treated as null and void); *Davis* v. *Grey*,

83 U.S. (16 Wall.) 203, 232-3, 21 L.Ed. 447, 457 (1873) (multiplicity); *Dows* v. *City of Chicago*, 78 U.S. (11 Wall.) 108, 20 L. Ed. 65 (1871) (multiplicity); *Dodge* v. *Woolsey*, 59 U.S. (18 How.) 331,15 L.Ed. 401 (1856) (numerous shareholder-plaintiffs without other practical remedy).

* * *

The stark fact is that all the single taxpayers of Kansas (1988-1997) have never had an adjudication on their substantive claim that the "liberty interest" protected by due process (including an absolute fundamental right not to marry, or "to be and remain single") was systematically penalized by the statutory rate system built into K.S.A. § 79-32,110 (1988-1997). The mathematical surtax contained therein was unconstitutional on its face, in that it indeed systematically penalized all single persons, up and down the income scale. Petition, section 19, and *passim*. These petitioners' claims are founded on their own "liberty interest" protected by due process, not equal protection doctrine. *Loving* v. *Virginia*, 388 U.S. 1, 12 (1967) (Part II). Neither Congress nor any other state has ever attempted such a regime. But see, *State* v. *Gowdy*, 62 Mont. 119, 203 Pac. 1115 (Mont. 1922) (higher head tax on bachelors struck in part as "punitory"). See also, *Vivien Kellems*, 58 T.C. 556 (1972), aff'd. per curiam, 474 F. 2d 1399 (2d Cir. 1973), cert. den., 414 U.S. 831 (1973), where, before uttering a word about "classification" or equal protection, Judge Withey correctly observed that Congress had not intended to regulate, or restrict, or penalize single persons. 58 T.C. at 558. Here, the Kansas statutory mathematics are obvious; Kansas wasn't bracketing income. It slapped higher rates on all single persons, poor, middling and rich.

Appendix F

Equal protection doctrine of "classification" (as to married vs. single persons) expounded in other cases does not control the fundamental rights claims brought in this suit. It denies due process for this court to close its doors (on any such ground) to these plaintiffs. *South Central Bell Tel. Co.* v. *Alabama*, 526 U.S. 160 (1999); *Richards* v. *Jefferson County*, 517 U.S. 793 (1996). Cf., *Lunding* v. *New York Tax Appeals Trib.*, 522 U.S. 287 (1998) (plaintiff brought multiple arguments, but won on his "privileges and immunities" claim; N.Y. was "surtaxing" non-residents' alimony, which "smacked" of a penalty). The fundamental right to choose to remain single, *or not to marry*, is not administrable by governmental authority; it is inherent in citizens themselves. *Loving* v. *Virginia*, *supra*. The exercise of fundamental rights is not surchargeable. *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943); *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). "Classification" has nothing to do with it. *Simon & Schuster* v. *N.Y.S. Crime Victims Bd.*, 502 U.S. 105 (1991) (Kennedy, J.). Yet respondents have represented to petitioners that *Peden* v. *Kansas*, 261 Kan. 239, 930 P. 2d 1 (Kan. 1996), cert. den., 520 U.S. 1229 (1997), just solved every little problem. Falsely. Petition, sections 7, 8, 25, 33, 34, 39, 40, 48 (all hearings "abeyed," pending *Peden*). Kansas may not tax anything and everything it can find words to describe, simply by mouthing low scrutiny equal protection doctrine.

* * *

Petitioners invoke their own *procedural* due process rights to an adjudication of their substantive claims brought herein, under the XIVth Amendment to the United States

Constitution, and further to a practical *effective remedy issuing from this court*, for themselves and all single taxpayers who were assessed Kansas income taxes (1998-97), also under said XIVth Amendment, and under the Kansas Bill of Rights § 3, § 18. There is no other judicial forum in this state which actually *has* technical jurisdiction over single petitioners' facial claims, which are constitutional, and not factual or discrete in any case by case sense. Respondents have never been given judicial authority to "administer" a facial challenge to a statute on constitutional grounds.

The Constitution mandates a remedy where the state imposes a flatly unconstitutional levy or charge, which remedy must be simple and effective. *Reich* v. *Collins*, 513 U.S. 106 (1994) (denial by state court of effective refund remedy is itself a due process violation); *Ogden City* v. *Armstrong*, 168 U.S. 224 (1897) (statutory remedy not exclusive where tax is void *ab initio*); *Tennessee* v. *Sneed*, 96 U.S. 69, 24 L. Ed. 610 (1877) (statutory remedy must be simple and effective); *Board of Liquidation* v. *McComb*, 92 U.S. (2 Otto) 531, 541, 23 L.Ed. 623, 628 (1876) ("... writs of mandamus and injunction are somewhat correlative...."); *DeLima* v. *Bidwell*, 182 U.S. ~~1,~~ 180, 45 L.Ed. 1041, 1049 (1901) ("... plaintiffs were at liberty to waive the tort and proceed in assumpsit" regardless of a remedy [or not] under the relevant U.S. customs administrative act, where the "tax" question was actually about United States constitutional sovereignty over Puerto Rico); *Cyprus Amax Coal Co.* v. *United States*, Georgetown.edu/Fed-Ct/Circuit/fed/op./99-5060 (Fed. Cir.

2000), cert. den., _ U.S. _ (6-4-2001) (administrative remedy not exclusive; constitution provides self-executing refund remedy for unconstitutional tax).

* * *

The purpose of the pre-hearing conference requested herein would be:

(i) to consider the simplification of the issues,

(ii) to consider the issuance of an Order to Show Cause why the requested writ of mandamus for respondents to reassess Kansas income taxes heretofore levied on single natural persons (by simply recomputing past ministerial assessments based on Kansas income tax returns and Kansas taxable income information already filed and reported by single persons with respect to the taxable years 1988-1997, on the basis of correct rates, Petition, section 20, and thereafter allowing credits or refunds carrying forward from such prior taxable years) should not issue, and

(iii) to discuss the entry of an Order fixing dates for the submission of other background information and the filing of briefs, and

(iv) to consider such other matters as the court shall deem necessary, all pursuant to Rule No. 9.01(e).

Appendix F

Respectfully submitted,

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Supreme Court, U.S.
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No. 02-151

IN THE

Supreme Court of the United States

CAROLYN A. ("HOWERTER") LA FAVRE, AND JAMES SCOTT MERRITT, JR., ON BEHALF OF THEMSELVES AND ALL SINGLE KANSAS INCOME TAX PAYERS,

Petitioners,

v.

KANSAS DEPARTMENT OF REVENUE, A KANSAS AGENCY, TIM SHALLENBURGER, AS STATE TREASURER OF KANSAS, STEPHEN S. RICHARDS, SECRETARY OF REVENUE OF THE KANSAS DEPARTMENT OF REVENUE, JEFFREY LOCHOW, DIRECTOR OF DIVISION OF TAXATION OF THE KANSAS DEPARTMENT OF REVENUE, AND DAVID J. HEINEMANN, AS AGENT AND DESIGNEE OF SECRETARY OF REVENUE AND OF DIRECTOR AND DIVISION OF TAXATION OF KANSAS DEPARTMENT OF REVENUE,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KANSAS

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF ON PETITION FOR A WRIT OF CERTIORARI

Pursuant to Rule 15.8, petitioners wish to call the Court's attention to the intervening matter discussed below, which transpired after the instant petition ("Pet. for Cert.") was filed on July 24, 2002. Petitioners urge that their petition herein should be considered in conjunction with No. 02-260.

* * *

On August 20, 2002, a petition for certiorari, styled as *Millcraft-SMS Services, L.L.C., et al.* v. *Underwood, Com.'r.*, No. 02-260 (hereinafter "*Millcraft-SMS*") was docketed in this court. That petition seeks review (and summary reversal) of *Patterson, Com.'r.* v. *Gladwin Corp., et al.*, 2002 Westlaw 1003524, __ So. 2d __ (Ala., May 17, 2002, no. 1001747), which petitioners herein have cited in their own petition. Pet. for Cert., 5 n.2, 6 n.2, 20, 22. Petitioners noted that Alabama case to explicate the importance of the matter raised by their first Question. Pet. for Cert. i. In both cases all the relevant taxpayers have filed returns disclosing the necessary information for ministers to compute the correct tax, and credit or refund the excess. *It remains for a court to determine a set of valid or "saved" tax rates and order redress*. No one (neither claimants nor ministers) could determine a refund until then, except by individualized haggling. Yet both state courts have dismissed the taxpayers' cases.

I. IMPORTANCE OF THE QUESTIONS

The important common question (in technical terms) is really whether the mandate of citizen "due process" encompasses a right to invoke equity practice in a trial court (via a "class action") or mandamus from a state supreme court, in the extraordinary tax case where a mass of known citizen-taxpayers brings a common restitutional claim arising from mass

collections under a statutory levy which is (or is challenged as being) unconstitutional. Actuarial law seems to tell the states (i) to collect taxes at their pleasure from all the citizens, and that (ii) their chances of keeping most of the money are quite good, regardless of the ultimate unconstitutionality of a given levying statute. Actuarial law demonstrates that most citizens will not follow all the special administrative steps required by positive state law as to separate post-return refund claims; most individuals won't be able to afford such steps. The Kansas administrative system works this way. Pet. for Cert. 4-5, 12-13 n.4, 16 n.8, 18. The genius of the two state systems as shown by the results below is that the problem of the mass unconstitutional state collections vanishes from view. It is the taxpayers who are put on trial in the state courts. Both petitions here raise the question of whether it is the multiplicitous state systems for redress which are defective in according due process.

II. PHRASING THE QUESTIONS

As to the "Question Presented" in *Millcraft-SMS*, compared to the first Question in the instant case, Pet. for Cert. i, the respective petitioners' phraseologies differ. The posture of the two cases is somewhat different. Petitioners here have been denied access to a court which can both adjudicate the case on the merits and order a restitutional remedy, good (simple, effective and "meaningful") for *all afflicted taxpayers under the circumstances*, in a single proceeding. In *Millcraft-SMS*, the problem is limited to refunds; this Court has already held that the relevant taxes were unconstitutional. In both cases, the respondents already know who the afflicted taxpayers are, and they have the relevant numerical information in their own files. That distinguishes these cases from the ordinary administrative dispute over some deduction or other, peculiar to one citizen.

Newsweek, Inc. v. *Florida Dept. Rev.*, 522 U.S. 442 (1998) (re access to court and refunds), and *Reich* v. *Collins*, 513 U.S. 106 (1994) (proscribing "bait and switch" as to apparent

remedies), upon which both petitioners rely, are in part rooted in older due process cases, arising from systematic illegality afflicting a "multiplicity" of wrongfully assessed taxpayers. *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930); *Ward* v. *Love County (Okla.)*, 253 U.S. 17, 22-24 (1920). Cf., *United States* v. *Osage County (Okla.)*, 251 U.S. 128, 132-4 (1919). The issue in the latter three cases was not so much whether the *taxpayers* were "reasonable," or "average," or had simply proceeded to request a meaningful remedy by trial and error, or were dumb as a fencepost. The problem was not whether all of them could have anticipated all the ins and outs (or timed the shifts) of state procedural lore and judicial doctrine. The dispositive matters were that (1) the states had no power to collect any of the relevant taxes (in systematic contravention of federal rights) in the first place, and (2) the state remedial systems designed for correction of errors or omissions in simple ordinary cases wouldn't work. Cf., *Ogden City* v. *Armstrong*, 168 U.S. 224, 237-241 (1897) ("Where the tax was wholly void and illegal, as in this case, the statute and its remedies for error and irregularities have no application"). Such state remedies (whether ancient, statutory, or newly invented by state judicial doctrinal manipulation) were not exclusive where the denial of federal rights was systematic, affecting a multiplicity of "deprived" taxpayers. Equitable cognizance would work. Cf., *Tennessee* v. *Sneed*, 96 U.S. 69, 24 L. Ed. 610 (1877) (statutory refund remedy for one taxpayer, replacing original right to mandamus, must be simple and effective); *Davis* v. *Grey*, 83 U.S. (16 Wall.) 203, 232-3, 21 L. Ed. 447, 457 (1873) (not necessary to join all affected adverse claimants); *The City of Chicago* v. *Dows*, 78 U.S. (11 Wall.) 108, 112, 20 L. Ed. 65, 67 (1871) (multiplicity). So too, mandamus would work here.

Petitioners believe their first Question is whether the result below worked a denial of petitioners' due process rights (as to their federal claims), contrary to *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930) and *General Oil Co.* v. *Crain*, 209 U.S. 211(1908). The Supreme Court of Kansas is

the only court which has original jurisdiction to hear petitioners' substantive federal constitutional claims against the levying statutes and to order mass redress, in mandamus, for all afflicted citizens. Pet. for Cert. 6-7, 20, Pet. App. E, 55a-63a; *ibid.*, Pet. App. F, 67a-71a. Yet it terminated such claims without any specific holding for review here. At this point, petitioners have been deprived of their access to court; thus their common chose in action to seek an "order of the court" for ministerial refunds under K.S.A. § 79-32,105(c) is depreciated to actuarial insignificance. That is a "deprivation."

If the first Question really is whether the petitioner-taxpayers have behaved "reasonably," they cannot be faulted for noticing that Kansas statute law explicitly makes the respondents herein responsible for refunding or crediting income tax overpayments shown by an examination of any and all taxpayers' returns. K.S.A. § 79-32,105(c). Pet. for Cert. 10-14. It *does not require a post-return "claim,"* or that *each* taxpayer be before a court. That is why petitioners ultimately resorted to mandamus below. They made an eminently reasonable evaluation of what mandamus is for, and went to the right court. Kansas Constitution, Art. 3 § 3; Kansas Bill of Rights, § 3; K.S.A. § 60-801. The requested writ to respondents in this case would be "meaningful" relief within the diagnostic approach of *Reich* v. *Collins*, *supra*. It was not merely reasonable to invoke the original jurisdiction of the Supreme Court of Kansas; under the circumstances it was imperative.

III. UNCONSTITUTIONAL RESULTS

In the wake of the instant case and *Millcraft-SMS*, the purportedly exclusive state administrative systems, apparently permitting only piecemeal remedies, reveal a financial tontine in which most taxpayers will never get full constitutional redress, dollar for illicit dollar. All petitioners

garnered were two stentorian denials of any attention to their fundamental rights claims under the due process clause of the Fourteenth Amendment. Likewise, Alabama seems to have won the battle of *South Central Bell Tel. Co.* v. *Alabama*, 526 U.S. 160 (1999), as a matter of actuarial pecuniary gain, unless due process mandates otherwise.

CONCLUSION

The results so far in this case and in *Millcraft-SMS* amply demonstrate that either the state supreme courts, or taxpayers and the bar, have not fully absorbed the lessons of *Reich* v. *Collins*, 513 U.S. 106 (1994), and *Brinkerhoff-Faris Trust & Savings Co.* v. *Hill*, 281 U.S. 673 (1930). Both cases deserve review here (and summary reversal).

Respectfully submitted,

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